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Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-951

NUCLEUS OF CHICAGO HOMEOWNERS ASSOCIATION, ET AL.,

Petitioners,

vs.

CARLA A. HILLS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioners, Nucleus of Chicago Homeowners Association and the other numerous plaintiffs below, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 6, 1975.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit entered October 6, 1975 (A. 14) is reported at 524 F. 2d 225 (7th Cir. 1975). The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (A. 8) entering judgment in favor of defendants and dismissing the case on the merits is reported at 372 F. Supp. 147 (N. D. Ill. 1973).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1975. (A. 25) This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Can the Department of Housing and Urban Development—charged by statute with developing integrated housing—ignore socio-economic information which will affect the integration of housing in Chicago.

2. Can the Department of Housing and Urban Development ignore its statutory responsibilities to promote integration and to analyze the social environmental impact of its actions by piecemeal analysis of isolated projects without developing a plan for metropolitan integration where socio-economic evidence shows that Chicago will become an all-black city without such planning.

STATUTES INVOLVED.

This case involves the responsibility of the United States Department of Housing and Urban Development to consider and analyze relevant socio-economic and racial data and to develop plans for balanced integrated housing pursuant to the mandates of the National Housing Act of 1949, 42 U. S. C. § 1441, *et seq.;* the Civil Rights Act of 1968, particularly 42 U. S. C. § 3608; and the National Environmental Policy Act, 42 U. S. C. § 4321, *et seq.*

STATEMENT OF THE CASE.

This controversy involves the roles of the courts and the Department of Housing and Urban Development in shaping a racially integrated residential housing program for the Chicago

metropolitan area. Frustrated with the complete and utter failure of the Department of Housing and Urban Development to set forth a rational program to develop "truly balanced and integrated living patterns" under its multiple housing authorities, the Seventh Circuit Court of Appeals has approved district court plans or developed its own remedial orders which it feels will accomplish integrated housing in the Chicago area.

Rather than order HUD to articulate the relationship of its housing programs to the goal of integrated housing, the Seventh Circuit has taken unto itself the role of city planner, sociologist and urbanologist without bothering to seek advice from knowledgeable experts on the necessary elements for successful integration and without bothering to observe fundamental legal requirements in framing its decisions. Two of the Seventh Circuit's residential segregation decisions spawned by this frustration are presently before this Court—*Hills* v. *Gautreaux,* No. 74-1047 *cert. granted* 421 U. S. 962 (1975) and *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation, et al.,* No. 75-616 *cert. granted* ..... U. S. ....., 44 L. W. 3358 (1975).

Unless this Court delineates the proper role of the courts, HUD and other relevant agencies, the national goal of integrated housing will be destroyed.

Gautreaux, Arlington Heights and the instant petition all result from the failure of the Seventh Circuit and HUD to distinguish between restraints on a court's equitable power to remedy unconstitutional segregation in housing by ordering a metropolitan housing program[1] and HUD's statutory responsibility to affirmatively develop racially balanced integrated communities. *Shannon* v. *HUD,* 436 F. 2d 809, 816 (3rd Cir. 1970), 42 U. S. C. § 1441, 42 U. S. C. § 3608.

The Seventh Circuit's remedial power in the *Gautreaux* litigation is limited to remedying the constitutional violation complained of by the *Gautreaux* plaintiffs—segregation of public

1. The basis of HUD's appeal in *Hills* v. *Gautreaux,* No. 74-1047 relying on *Milliken* v. *Bradley,* 418 U. S. 717 (1974).

housing in Chicago. Under this Court's decision in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), the limits of the court's remedial authority for this constitutional violation is desegregation of public housing within Chicago's city limits.

Yet HUD, the Chicago Housing Authority, the *Gautreaux* plaintiffs and the Chicago neighborhood homeowner's groups who bring this petition all agree that scattering public housing sites within Chicago alone will simply result in the resegregation of the entire city. For effective *integration* (as opposed to desegregation) to work, public housing must be planned and implemented on a metropolitan basis.

In *Gautreaux*, *Arlington Heights* and the decision below the Seventh Circuit has tried to integrate the Chicago metropolitan area rather than eliminate segregation. In doing so, the Seventh Circuit has completely ignored HUD's statutory responsibility to develop affirmative programs for *integration* of housing patterns.

HUD, of course, fervently hopes that this Court will reverse *Gautreaux* without directing its attention to HUD's failure to set forth a program for stable residential *integration* of the Chicago metropolitan area. In contrast, petitioner homeowner groups respectfully ask this Court to give proper instructions to the Seventh Circuit and HUD as to their respective roles.

The Seventh Circuit should be instructed to order HUD to affirmatively develop a metropolitan housing plan for stable integrated housing as required by statute. In doing so, HUD should be required to receive and evaluate all relevant socio-economic and racial data. The Seventh Circuit should stay its hand in providing a metropolitan remedy for HUD's statutory failure to integrate[2] until HUD is given an opportunity to develop and present such a plan.[3] Throughout the entire *Gautreaux*

2. As opposed to remedying Chicago's unconstitutional segregation.

3. "Judicial authority enters only when local authority defaults." *Swann* v. *Board of Education*, 402 U. S. 1, 16 (1971).

epoch, HUD has never been ordered to perform its statutory duty to integrate.

The History of the Present Controversy.

On February 10, 1969 the United States District Court for the Northern District of Illinois ruled that statistics submitted by plaintiffs in *Gautreaux* v. *Chicago Housing Authority*[4] demonstrated that the Chicago Housing Authority had engaged in racial discrimination in selecting sites for low income housing in the City of Chicago. The trial judge ordered the parties to submit a comprehensive plan to correct the constitutional violations. In an often-quoted statement, the district court established the following laudable goal:

> "[E]xisting patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago. On the basis of present trends of Negro residential concentration and of Negro migration into and White migration out of the central city, the President's Commission on Civil Disorders estimates that Chicago will become 50% Negro by 1984. By 1984 it may be too late to heal racial divisions."
>
> 296 F. Supp. at 915.

The Chicago Housing Authority (CHA) failed to develop a remedial plan.[5] Consequently, the district court decided to enter

4. 296 F. Supp. 907 (N. D. Ill. 1969).

5. Part of this failure can be explained by the role played by the Department of Housing and Urban Development at that time. While HUD was the financial source of 100% of CHA's financing for low rent public housing through the Housing Act of 1937 (42 U. S. C. § 1401 *et seq.*, as amended by the Housing and Community Development Act of 1974, P. L. 93-383, 42 U. S. C. § 1437, *et seq.*), HUD was not a party to the original judgment of liability or to the remedial order entered by the district court. The district court had stayed a companion suit against HUD during the suit against CHA and then dismissed the suit against HUD. HUD's critical role in housing policy was subsequently recognized by the Seventh Circuit which reversed the district court and held HUD liable for CHA's actions. *Gautreaux* v. *Romney*, 448 F. 2d 731 (7th Cir. 1971).

a remedial plan of its own. Significantly, in shaping its remedial order, the district court did not consult HUD (the federal agency presumably expert in housing policy) or any experts in the field of housing or urban sciences. Nor did the district court ever conduct any public or evidentiary hearings on a proposed order.

Rather, the district court entered a lengthy complex order drafted almost entirely by plaintiffs' lawyers who, by their own admission, had no experience in housing or urban planning.[6]

The order, drafted without benefit of evidentiary hearings or expertise, contained a complex formula delineating the size and location of physical housing structures and the number of public housing tenants in any one location.[7] While the purpose and efficacy of these requirements have never been articulated, the *Gautreaux* lawyers and the district court apparently hoped that these conditions would be sufficient to create stable integration in the white areas of the city.[8]

Again, it must be emphasized that the district court failed to seek any expert advice or conduct any hearings about the conditions necessary to insure effective integration in housing patterns. No attention was paid to the special social service needs and problems of public housing families[9] and the relationship of those problems to effective integration.

The case against HUD was then consolidated with the case against CHA but this consolidation took place long after the district court had entered its remedial order.

6. "[T]he Gautreaux judgment order was drafted with two exceptions by plaintiff's attorneys *who admitted having no previous housing experience and yet failed to consult anyone who did.*" (emphasis added) Comment, *Public Housing and Urban Policy*, 79 Yale L. J. 712, 726 (1970).

7. 304 F. Supp. 736 (N. D. Ill. 1969).

8. "These provisions, limiting the size and concentration of future projects are apparently designed to assure stable integration of the new housing into the larger white community." *Public Housing and Urban Policy, supra* n. 6 at 720.

9. Indeed, the special needs and problems of low income families have been totally ignored by both public officials and the courts in this controversy. Yet these needs and problems have been exhaustively documented. See *e.g. More Than Shelter: Social Needs in Low and Moderate Income Housing*, Report to the National Commission on Urban Problems (1968); *Human Needs in Public Housing*, Welfare Council of Metropolitan Chicago (1970); and *Freedom of Choice in Housing: Opportunities and Constraints*, National Academy of Sciences (1972); see discussion *infra*.

Following the district court's order of July 1, 1969, CHA proceeded to select sites for 1500 units of low income family housing which had been given a funding reservation by HUD. Available sites were selected by the CHA engineering department by simply locating vacant lots on city maps. (Tr. 485, 486)

The CHA engineering department made no attempt to determine the adequacy of educational facilities, health services, employment opportunities or any other social service programs in the site areas. Nor did the engineering department seek any advice or assistance from those persons in CHA who had skills and training in social service needs and tenant social problems.[10]

Ironically, the CHA engineering staff totally ignored the findings of a massive study on tenant social problems and needs sponsored by the CHA and performed by the Welfare Council of Metropolitan Chicago—*Human Needs in Public Housing*. Though he was aware of the study, the engineer who selected the sites never bothered to read it.

This complete lack of inquiry or investigation into potential social problems and available social service resources stands in stark contrast to the recommendation of Clyde Murray, a CHA expert witness at trial and principal author of *Human Needs in Public Housing*. He testified that had he been responsible for planning scattered site housing, he would want to comprehensively investigate the availability and adequacy of health, educational, family counseling, employment and recreational facilities in the prospective site communities. (Tr. 2599)

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10. Throughout the entire course of site selection by CHA and subsequent approval of the sites by HUD, no one in the CHA management department, which purportedly has the most knowledge of tenant problems and social service needs, was ever consulted by CHA engineers or HUD personnel. (Tr. 748, 749, 1487)

Despite its complete failure to evaluate the vacant lots it had selected with regard to available social services or potential social problems, CHA submitted these vacant lots to HUD for HUD's site approval. (P. E. 8, 9, 10) HUD gave approval to the CHA sites for 1500 units in 1970 without ever addressing the social needs and problems of low income families who would live in these units. (P. E. 11, 13)

In 1972, shortly after CHA publicly announced the site locations, community organizations in the site neighborhoods sought expert advice about the likely success of the low-income housing to be constructed under the district court's order. Consulting with Dr. Morris Janowitz of the University of Chicago and Dr. Thomas Gannon, S.J., Chairman of the Department of Sociology at Loyola University of Chicago, they were advised that the district court's order was more likely to foster segregation than promote integration. Moreover, because of refusal by CHA and HUD to recognize and treat the social problems and needs of low income public housing families, the placement of these families in middle class communities would exacerbate the anti-social hostilities which characterize much of low income family public housing today.[11]

The advice of Dr. Gannon and Dr. Janowitz was not new. Numerous studies have pointed out the social problems and needs of low income families and the relationship of those problems to effective racial integration. The following quotes are illustrative of the problem:

A. *Human Needs in Public Housing*, a study of CHA public housing commissioned by CHA and performed by the Welfare Council.

1. "The effects of urban development and urban renewal in the late 1950's and early 1960's created a change in the type of family characteristic of public

11. Because of its significance to HUD's duty to affirmatively develop effective racial integration in housing and to analyze all relevant racial and socioeconomic data, the text of Dr. Janowitz and Dr. Gannon's report is attached to this petition. (A. 26)

housing residents in this as well as in other cities. By 1968 nearly 40 percent of Chicago's public housing units were inhabited by families who for the most part were not self-supporting but rather were receiving some form of public assistance. Being eligible for public assistance meant that the majority constituted the lowest part of the income scale in Chicago, and it was hardly surprising to find a large proportion of broken families without wage earners, or families where primary earner was unemployed or incapacitated. These families were those whose needs [sic] were unskilled, many were ex-slum dwellers relocated through preferential urban renewal admission policies, and they brought to public housing their hatreds and hostilities of deprivation." *Human Needs in Public Housing*, Welfare Council of Metropolitan Chicago (1970), Appendix p. 46, Plaintiffs' Exhibit 39.

2. "One particular aspect of the public housing program which has demanded the Welfare Council's attention from time to time since World War II is the 'multiproblem' family. These are people who are so battered by the cumulative effects of poverty and discrimination that they are in need of special help in the form of medical, psychological, vocational, homemaking and educational services." *Human Needs in Public Housing*, Appendix p. 46.

3. "As is well known, the proportion of 'broken homes' headed by a woman is extremely high in public housing. . . . The percent unemployed in the last column is closely associated with the percent of female-headed households in the first column as might be expected—the higher the proportion of female-headed households, the greater the incidence of unemployment and vice versa. Actually the pattern of unemployment among heads of households here is believed to correlate quite closely with dependency upon public assistance for support, and can generally be taken as a measure of the latter, since the family would need some source of income to qualify for public housing, and without an employed head this would nearly always have to be Public Aid." *Human Needs in Public Housing*, pp. 178, 179.

4. "The outstanding feeling that emerged as related to features which residents say they like least about living in public housing developments, is a feeling of fear. Fear for personal and family safety seems to be almost universal among CHA residents. . . ." *Human Needs In Public Housing*, p. 17.

5. "The survey leads to an overriding conclusion that the existing level of services to low-income people is substantially inadequate." *Human Needs In Public Housing* Foreword, p. i.

6. "A better coordination of existing agency services at each site is essential. CHA should take the lead with the agencies in developing multi-service delivery systems for all residents. In addition, particular attention should be given to certain groups of residents. The National League of Cities rightly points out that more emphasis should be placed on the needs of the large family, the fatherless family and the very low-income family, and on the need for adequate programs of guidance, counseling and other supportive services for the multi-problem family in public housing." *Human Needs In Public Housing*, p. 31.

7. "The Chicago Housing Authority, like many others in larger urban centers is faced with the reality that the increasing social service burdens of large concentrations of multi-problem families in public housing can no longer be totally borne by the established health and welfare agencies of the general community.

"The social service role of the Chicago Housing Authority is of major concern today. There had been little emphasis in this area until the social problems of public housing families had multiplied to the critical level which is evident today. Now, as public housing locally and to some degree nationally contains an overwhelming percentage of so-called 'multi-problem' families, the element of resident services in policy as well as in practice is being emphasized:

"One of the most important lessons learned through public housing experience over the past 25 years is that good housing, by itself, will not enable families

to solve all of their economic and social difficulties. Among the low-income families served by the public housing program, there is a range of social service needs." *Human Needs In Public Housing*, Appendix, p. 47.

B. Statement by Anthony Downs before the Senate Select Committee on Equal Education Opportunity, 91st Cong., 2nd Sess., p. 2966. (Federal defendants' Exhibit No. 10 in Support of Motion to Dismiss)

1. "There is overwhelming statistical evidence that crime rates, delinquency rates, and relatively violent and noisy patterns of public comportment are much more prevalent among low-income households in the U.S. than among middle-income families." p. 2971

Downs properly notes that problems of crime, violence and other anti-social behavior are related to socio-economic background and not race or ethnic background.

2. "In thinking of many whites, ethnic characteristics are often confused with socio-economic status because such a high proportion of blacks, Puerto Ricans and Mexican Americans live in low-income households. Hence many whites wrongly perceive members of these minority groups as inherently possessed of certain characteristics typical of many low-income households but regarded as highly undesirable by most middle-income households of whatever background. I am referring to high crime rates, high juvenile delinquency rates, high rates of illegitimate birth and premarital sexual activity, use of certain speech patterns and behavior patterns repugnant to many middle-class parents, and a tendency to be most violent and threatening in interpersonal relations. These essentially 'lower-class' traits are not in any way necessarily associated with race or ethnic background." p. 2968

C. *Freedom of Choice in Housing: Opportunities and Constraints*, a study commissioned by HUD and performed by the National Academy of Sciences. (Plaintiffs Exhibit 5)

1. "[O]ur review of behavioral and social science research supports the view that:

"Interracial living is feasible. Evidence to confirm this proposition is both varied and compelling. On the other hand, the feasibility of residential mixing of different economic levels is uncertain. Our present knowledge in this area is limited.

"Consequently, simultaneous efforts to achieve racial and economic mixing may work at cross purposes."

Freedom of Choice in Housing, p. 6 (emphasis added)

2. "[S]imultaneous efforts to reduce racial segregation and class stratification may in fact be counterproductive."

Freedom of Choice in Housing, p. 33

3. "Policies designed to achieve racially mixed neighborhoods and housing should aim at providing the physical and social environment for constructive contact conditions for all groups."

Freedom of Choice in Housing, p. 59

Given this massive data[12] on the social problems and needs of low-income families and the documented failure of HUD and CHA to address those needs, it is not surprising that community organizations in the site areas have expressed concern about the district court's order in *Gautreaux*. These organizations and numerous individuals filed suit in 1972 against HUD and CHA asking that HUD be required to develop a coordinated plan for effective residential integration. Such a plan would include:

1. A full inventory of the socio-economic, educational characteristics of the potential residents and the

12. For a historical analysis of the social problems of low income public housing families see Friedman, *Public Housing and the Poor: An Overview*, 54 Calif. L. Rev. 642, 652-655 (1966). See also *More than Shelter: Social Needs in Low and Moderate Income Housing, A Report to the National Commission on Urban Problems* (1968), pp. 30-31 and 64-66.

medical, welfare and recreational needs of potential residents.

2. An inventory of community resources, specifying such facilities as schools, day-care centers, community centers, religious institutions, parks and playgrounds and full and part-time employment opportunities.

3. An analysis of the adequacy of personnel resources available in the site communities.

4. An examination of the organization and administrative procedures used by the Chicago Housing Authority.

5. An examination of alternative strategies such as better job opportunities, income supplements, and rebuilding of central city.

6. Mechanisms such as metropolitan planning.

(Tr. 417-423, 1130, 1131, 2599)

The legal obligation plaintiffs sought to enforce against HUD has two bases. First, as part of HUD's affirmative duty to promote "the development of well planned integrated, residential communities"[13] the plaintiffs asked that the agency develop an affirmative reviewable record of its plans to integrate housing and to include within that record all "relevant racial and socioeconomic information" *Shannon* v. *HUD*, 436 F. 2d 809, 821 (3rd Cir. 1970).

Related to this duty to consider all relevant socioeconomic data were duties imposed by the National Environmental Policy Act, 42 U. S. C. § 4321 *et seq*. Included in the duties imposed by § 102 of NEPA were:

1. The duty to "utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences." (§ 102(2)(A));

2. The duty to prepare an environmental impact statement on proposed actions "significantly affecting the human environment" (§ 102(2)(C)); and

13. 42 U. S. C. § 1441, 42 U. S. C. § 3608, *Shannon* v. *HUD*, 436 F. 2d 809, 816 (3rd Cir. 1970), *Otero* v. *New York Housing Authority*, 484 F. 2d 1122, 1134 (2nd Cir. 1973).

3. The duty to study, develop and describe alternative courses of action to accomplish the goals sought to be achieved (§ 102(2)(D)).

The testimony at the trial simply reflected and reaffirmed the sorry historical trend in public housing populations, both nationally and in Chicago. Tenant families in the Chicago Housing Authority are increasingly characterized by broken, female-headed families on welfare and without employment. Dr. Gannon testified that CHA statistical data disclosed that 71% of CHA families are broken and 53% are receiving welfare assistance. (Tr. 358, 359) Gustave Master, a CHA witness testified that 95% of broken families are headed by females. (Tr. 739) Both Dr. Gannon and Mr. Clyde Murray[14] testified that a close relationship exists between broken homes, welfare assistance, unemployment and female headed families. (Tr. 2660, 2661)

This increase in families with broken homes, unemployed female heads and on welfare is closely related to the growth of "multi-problem" families in CHA. Families with these characteristics were much more likely to become "multi-problem" families. (Tr. 2574, 2580)

If these families do not receive well planned comprehensive social services such as health, education, employment, youth and family counseling and recreational opportunities, they are likely to engage in anti-social acts such as personal violence and property destruction. (Tr. 2568, 2569, 2571, 2575, 2580)

In contrast, an analysis of plaintiffs' communities by characteristics as shown in official census data showed a much lower percentage of broken homes and a much lower percentage of families on welfare. (Plaintiffs' Exhibits 43, 55 and 56) When asked to compare the social service needs of families in plaintiffs' communities with the social service needs of the CHA families, Clyde Murray stated that public housing families

14. Mr. Clyde Murray, the principal researcher and author of *Human Needs in Public Housing* was called by CHA as a witness.

would have greater and different social service needs than residents of the site communities. (Tr. 2750) He also stated that the social service needs of a group could be predicted by looking at group characteristics. (Tr. 2681)

Dr. Gannon, Dr. Andrew Greeley[15] and Clyde Murray all agreed that in order to prevent potential problems of violence and property destruction as a result of public housing families not receiving comprehensive social services, a study should be done prior to the construction of the scattered site housing to identify mechanisms for eliminating or minimizing adverse impacts and to identify alternative strategies to accomplish the goals of scattered site housing. These alternatives included metropolitan—as opposed to city only—planning, rebuilding the central city and special employment, educational and other social services.

Evidence at trial also showed that HUD had approved sites for 1,500 units in 1970. (P. E. 11, 13) No analysis of the socioeconomic problems of low-income families and the impact of such problems on effective integration was ever made.

In defense, HUD tendered a "negative statement" on only 84 of the 1,500 units[16] and contended that no environmental impact statement was required. The responsible HUD officials made no attempt to read *Human Needs in Public Housing*, *Freedom of Choice in Housing* or any other of the materials which emphasized the need for comprehensive careful social planning prior to attempts to integrate low-income housing into middle-income communities. Instead, they wrote a *4 page* narrative on social impacts in which:

1. HUD said that there would be no strain on neighborhood facilities even though HUD officials admitted that neither they nor CHA had investigated the adequacy of social services in the site community.

15. Dr. Andrew Greeley is a prominent sociologist called by plaintiffs.

16. The "negative statement" was prepared on the eve of trial more than two years after the 1500 units had been approved by HUD.

HUD's other reason for dismissing any impact regarding community services is the small number of the units evaluated—eighty four. Yet HUD ignored the remaining one thousand four hundred and sixteen (1416) units approved by HUD and ordered by the district court in *Gautreaux*.

2. HUD said that the "diffuseness" of the sites and tenant selection policies would prevent adverse social impacts. Yet the defendants' own evidence at trial showed that simply reducing densities will not solve the problems of low-income families; low densities must be accompanied by comprehensive social services. (Tr. 2599) Moreover the CHA screening program has not prevented serious acts of anti-social conduct by tenants. (Tr. 928, 930)

Further, screening may constitute further discrimination against families who need public housing but who are rejected as undesirable. The answer to these problems lies in meeting the needs of these families; it does not lie in rejecting them from public housing.[17]

3. HUD then blithely stated in the negative statement that Community and Tenant Relations Aides of the CHA will provide necessary services when scattered site tenants have social problems. Unfortunately, HUD officials had never read the Welfare Council study (P. E. 39) which would have informed them that 84% of CHA tenants never used the Community and Tenant Relations Service in seeking help for problems. (P. E. 39, p. 25)

4. HUD continued its narrative in the negative statement by stating that CHA does not expect families in scattered sites to be "plagued with the problems that some tenants in existing large scale projects have." (Gov. E. 52) Yet HUD never states what these problems are or what aspects of the scattered site program will eliminate these problems. Indeed, HUD officials admitted that the only person they talked to at CHA about

17. See *Friedman*, op. cit. n. 12, *Public Housing and The Poor: An Overview*, 54 Cal. L. Rev. at 666, 667.

social service needs was the CHA legal counsel; they never talked with any management personnel. (Tr. 1487)

5. Finally, HUD concludes that there are no viable alternatives to the program. HUD failed to discuss metropolitan planning or any of the remedial services found by the Welfare Council to be so important.

Not once in the negative statement did HUD discuss how scattered site housing would foster racial understanding and reduce crime—both stated goals. (Tr. 1478, 1480, 1481, 1483, 1484)

In summary, HUD's 4 page negative statement that the scattered site program would have no significant impact on the environment of the site neighborhoods is vague, conclusory and unsupported by any investigation or evidence. It is a patent attempt to avoid serious social problems by pretending the problems don't exist.

Ironically, while HUD was piously stating there would be no problems and that there were no alternatives, all of the parties in the *Gautreaux* litigation—including the Black plaintiffs, CHA and HUD—were acknowledging that a city-wide remedy would not work and that metropolitan planning for public housing was necessary.

> "The parties are in agreement that the metropolitan area is a single relevant locality and that a *city-only remedy will not work*.
>
> *Gautreaux* v. *CHA*, 503 F. 2d 930, 937 (emphasis added)

The Seventh Circuit in the most recent substantive *Gautreaux* opinion is now saying what plaintiffs' experts have been saying all along:

> "Any remedial plan, *to be effective*, must be on a suburban or metropolitan erea basis."
>
> 503 F. 2d at 937[18] (emphasis added)

18. As discussed above, it is important to emphasize a fundamental distinction between the constitutional remedy for racial

HUD now says that though it advocates metropolitan area-wide planning for public housing, it doesn't want metropolitan planning to be ordered by the court.[19] HUD claims that the *Gautreaux* metropolitan order has a "chilling effect" on its other housing programs in the suburbs. Yet HUD itself refuses to engage in voluntary planning. HUD has yet to submit one page of analysis as to how HUD's housing programs in the Chicago metropolitan area can be utilized to develop balanced integrated communities.

The Chicago community organizations are thus faced with the following quandary. Plaintiffs' experts, HUD, CHA and the *Gautreaux* plaintiffs are in agreement that scattered site public housing will not work in the city. For effective integration to occur, it must be developed on a metropolitan basis. Without metropolitan development the white areas of the city will likely undergo a period of racial transition and then become resegregated. Yet the Seventh Circuit's metropolitan order in *Gautreaux* will likely be invalidated because the relief—desegregation—exceeds the scope of the constitutional violation. *Milliken* v. *Bradley*, 418 U. S. 717 (1974); *Swann* v. *Board of Education*, 402 U. S. 1 (1971). The likely consequence is that a city-only scattered site program will be implemented without any consideration of HUD's affirmative statutory duty to insure a balanced integrated community. Chicago will become further segregated.

The testimony at trial below reflected the sad knowledge found nationally and locally in studies by the National Academy of Science for HUD, by a report to the National Commission on Urban Problems and by the Welfare Council of Metropolitan

segregation which is desegregation and HUD's statutory duty to develop stable, balanced *integrated* communities. While the Seventh Circuit may have gone too far in ordering a metropolitan plan as a remedy for segregation (*Milliken* v. *Bradley*, 418 U. S. 717 (1974)), consideration of a metropolitan plan is absolutely essential for a balanced integrated community.

19. Brief for the Petitioner in *Hills* v. *Gautreaux*, No. 74-1047 in this Court at p. 39 n. 32.

Chicago in a CHA sponsored study. The problems and needs of public housing families go beyond bricks and mortar. For public housing families to be integrated into the mainstream of American life, the architects of public housing programs must abandon their historic disregard of social service planning and coordinate public housing (be it conventional or scattered) into comprehensive social programs designed to meet the human needs of the poor. Sadly, the lack of such coordination and planning in this case demonstrated that HUD and CHA have not yet learned the tragic lessons of the past.

The district court below filed a seven page typewritten opinion on a record covering approximately 5,000 pages of testimony and voluminous exhibits. In its opinion, the district court stated that no other cases had dealt with the socioeconomic impact of movements of low income residents upon a community.[20] The district court found that HUD has filed a "negative impact statement" declaring the housing ordered in *Gautreaux* would not have a significant impact on the environment and that the negative statement was made in good faith. The district court found that the evidence of potential harm rested primarily on the testimony of two social science experts[21] and that this testi-

20. On the contrary, both *Shannon* v. *HUD*, 436 F. 2d 809 (3rd Cir. 1970) and *Jones* v. *Lynn*, 477 F. 2d 885 (1st Cir. 1973), dealt with HUD's responsibility to assess socioeconomic impacts of low income groups moving into or out of a community. See also *Otero* v. *New York Housing Authority*, 484 F. 2d 1122 (2nd Cir. 1974).

21. The district court ignored the testimony by CHA witness Clyde Murray and the admission by David Mack of HUD as to potential problems. Clyde Murray testified that the high percentage of broken families suffering from unemployment and receiving welfare assistance had a strong need for such social services as health, education, employment, youth and family counseling and recreational opportunities. (Tr. 2554) Female-headed families, on welfare, and unemployed are much more likely to become "multi-problem" families and need these special services to fit into community life. (Tr. 2573-2575) If they don't get these supportive services, they are likely to cause problems for their neighbors, including acts of personal violence and property destruction. (Tr. 2567-2569, 2571, 2575, 2580, 3422, 3423, 3427-3429, 3430, 3431) David Mack,

mony was controverted by defendants' experts. The court questioned the use of statistics to predict social problems and questioned the ability of sociologists to predict social problems.

The district court concluded that there was no evidence that the social characteristics of public housing tenants created potential social problems. It thus concluded that construction of the housing units would not significantly affect the environment and that HUD had not violated § 102(2)(C) of NEPA.

The district court's opinion never made any findings as to whether HUD had complied with its own regulations or with Council on Environmental Quality (CEQ) regulations. Nor did the district court make any findings with regard to HUD's compliance with the other subsections of § 102, specifically sections 102(2)(A) and 102(2)(D).

Based on this opinion, the district court entered judgment for the defendants.

On appeal, the Seventh Circuit affirmed. It held:

1. That HUD did not have to consider the comprehensive environmental impact of the 1500 unit program and was correct in its decision to consider only 84 units. The key to its decision

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the HUD employee who wrote the four-page narrative on social environmental impact acknowledged that families with broken homes, lacking in employment and on welfare had a great need for social services and that such families could cause problems for their neighbors if they did not get adequate services. (Tr. 3427-3431) Moreover, on an offer of proof by the defendants, he was asked the following question and gave the following answer:

"By Mr. Berman:

Q. Mr. Mack, do you have an opinion as to whether multi-problem families have a greater possibility or a greater potential or propensity for creating problems among their neighbors than non-multi-problem families? (Tr. 3496)

By the Witness:

A. I would have to say I believe that there is that possibility that they would have a greater potential." (Tr. 3498)

The district court also ignored the Welfare Council study, *Human Needs in Public Housing.* (Plaintiffs' Exhibit 39)

was the court's erroneous assumption that "CHA had not selected and HUD had not tentatively approved 1500 proposed housing sites at the time the 84 unit environmental clearance was performed," 524 F. 2d at 230. However, the record demonstrates unequivocally that HUD *had* given approval to sites for all 1500 units by May 1970 over two years *before* the 84 unit negative statement was prepared.[22] A second consideration was the court's statement that the Council on Environmental Quality Guidelines (40 C. F. R. § 1500, *et seq.*) requiring comprehensive statements, were advisory only and didn't need to be followed.

2. That despite CEQ Guidelines which require an impact statement to be prepared whenever the project is likely to be highly controversial (40 C. F. R. § 1500.6(a)), "we are not persuaded that the controversy here is such as to require an impact statement." 524 F. 2d at 232.

3. With regard to HUD's failure to consider the social problems and needs set forth by eminent sociologists and by such documents as *Human Needs In Public Housing,* the court held that the law "does not require that a specific class of experts be consulted or that an agency consider all documents possibly relevant to a given environmental issue." 524 F. 2d at 232.

4. That HUD did not have to consider metropolitan planning and the provision of comprehensive social services to alleviate the problems of low-income tenants because HUD had no authority to develop other alternatives given the *Gautreaux* order. 524 F. 2d at 232.

5. That consistency with local zoning suggested that problems would not be severe.

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22. Plaintiff exhibits 11 and 13 being HUD's letters of March 13, 1970 and May 23, 1970 approving sites submitted by CHA.

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Conflicts with Decisions of the Supreme Court and Decisions of Other Circuit Courts of Appeal in That the Seventh Circuit Allowed HUD to Proceed with the Project Without Considering the Relevant Socio-Economic Data.

The Seventh Circuit upheld HUD's decision not to prepare a comprehensive analysis of the social impact of social problems and needs in low income family housing on the statutory goal of integration because the law "does not require that a specific class of experts be consulted or that an agency consider all documents possibly relevant to a given issue." 524 F. 2d at 232.

However, the law is clear that where an administrative decision is made without consideration of all relevant factors it must be set aside as arbitrary and capricious. 5 U. S. C. § 706(2)(A); *Scenic Hudson Preservation Conference* v. *F. P. C.*, 354 F. 2d 608, 620 (2nd Cir. 1965); *Hanly* v. *Mitchell*, 460 F. 2d 640, 648 (2nd Cir. 1972); *Shannon* v. *HUD*, 436 F. 2d 809, 819 (3rd Cir. 1970); Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 416 (1971).

Shannon v. *HUD, supra*, is the closest case in point and is in direct conflict with the decision of the Seventh Circuit below. There homeowners and businessmen in Philadelphia sued to prevent a low income HUD financed housing project from being constructed in a neighborhood on grounds that the project's prospective low income black tenants would destroy chances for a stable, racially balanced environment. HUD defended its site selection for a low income housing project on grounds similar to those raised below. HUD argued that it had complied with all zoning requirements.

Rejecting HUD's facile reliance on zoning compliance, the Third Circuit enjoined further construction of the project, stating:

> "When an administrative decision is made without consideration of relevant factors it must be set aside."
>
> 436 F. 2d at 819

> "We hold however that the Agency must utilize some institutionalized method whereby, in considering site selection, it has before it the *relevant racial socioeconomic information* necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts."
>
> 436 F. 2d at 821 (emphasis added)

This need to carefully consider socioeconomic and racial data in making housing decisions has been repeatedly acknowledged by the Second Circuit. In *Otero* v. *New York City Housing Authority*, 484 F. 2d 1122 (2nd Cir. 1973), the court upheld the right of housing officials to discriminate against minorities in order to promote balanced integrated residential patterns.

Finally, the recent decision in *Trinity Episcopal Church* v. *Romney*, 523 F. 2d 88 (2nd Cir. 1975) offers enlightenment on the use of NEPA to resolve dilemmas between the conflicting goals of stable integrated residential patterns and providing low income housing. The Second Circuit required HUD to investigate a variety of housing alternatives with the goal of maintaining an integrated community. The court required the investigation of these alternatives to include means to minimize the reprehensible conditions and dangers of crime, drugs and vandalism.

Nor can HUD avoid these obligations by claiming that the court decisions in *Gautreaux* have prevented it from analyzing any alternatives than those ordered by the court. The original *Gautreaux* decree has been modified before—most recently in its extension to the metropolitan area. HUD can and must under NEPA discuss alternatives that are not within its power. While HUD may not have the requisite authority to implement such alternatives, such action could be taken by the courts, the Congress or the President.

As the District of Columbia Circuit said in rejecting a similar claim that an agency could not analyze alternatives outside its statutory power:

> "The impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest."
>
> *National Resources Defense Council* v. *Morton*, 458 F. 2d 827, at 835 (D. C. Cir. 1972)

II. The Decision Below Conflicts with Decisions of This Court and Other Circuits Regarding the Deference to Be Accorded the Guidelines Promulgated by the Council on Environmental Quality.

In two key instances below the Seventh Circuit chose to ignore guidelines published by the Council on Environmental Quality. First it ignored the CEQ guideline that encourages agencies to engage in comprehensive planning of related projects.

40 C. F. R. § 1500.6(a) states:

> "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated . . . In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable . . ."

The Seventh Circuit chose to ignore this directive in allowing HUD to analyze only the first 84 units without analyzing the sites for the remaining 1416 units for which sites had been approved.[23]

23. In contrast the District of Columbia Circuit has repeatedly required programmatic as well as individual project analysis. See *Sierra Club* v. *Morton*, 514 F. 2d 856 (D. C. Cir. 1975); *Scientists Institute for Public Info.* v. *AEC*, 481 F. 2d 1079 (D. C. Cir. 1973).

Second, 40 C. F. R. § 1500.6(a) states:

> "Proposed major actions, the environmental impact of which is to be highly controversial, should be covered in *all* cases." (emphasis added)

Despite testimony by leading sociologists as to the hazards to effective integration caused by the *Gautreaux* plan, the Seventh Circuit said "[W]e are not persuaded here that the controversy is such as to require an impact statement." 524 F. 2d at 232

The Seventh Circuit's refusal to pay deference to the statutory construction of the very agency with statutory responsibility for reviewing NEPA compliance is contrary to numerous decisions of this Court and other circuit courts. See *Warm Springs Task Force* v. *Gribble*, 417 U. S. 1301 (1974), (opinion by Mr. Justice Douglas as Circuit Justice); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *Sierra Club* v. *Morton*, 514 F. 2d 856, 873 n. 24 (D. C. Cir. 1975). These cases hold that courts should pay great deference to the statutory construction given a statute by the agency charged with its administration. The Court below twice chose to ignore the Council on Environmental Quality's Guidelines without offering any basis for rejecting the agency's construction of the statute.

III. The Decision Below Fails to Recognize an Important Distinction Between the Proper Role of the Courts in Remedying Unconstitutional Segregation and the Affirmative Statutory Responsibility of HUD to Promote Stable Integrated Communities.

Ever since the first *Gautreaux* order[24] which imposed a complex remedial formula without hearings and without benefit of input by experts in the housing field, the housing segregation decisions of the Seventh Circuit have been characterized by a failure to understand the respective roles of agency and court in remedying constitutional violations. As this Court has repeatedly held, the constitutional scope of a federal court's reme-

24. 304 F. Supp. 736 (N. D. Ill. 1969).

dial power to correct a constitutional violation is limited by the extent of the violation. *Swann* v. *Board of Education*, 402 U. S. 1, 16 (1971); *Milliken* v. *Bradley*, 418 U. S. 717 (1974).

But, as the *Gautreaux* plaintiffs and the Seventh Circuit began to realize that the original *Gautreaux* order would actually accelerate the resegregation of the City of Chicago, the court grasped for a method to impose its concepts of integration on the Chicago metropolitan area. The Seventh Circuit set about to establish a basis for metropolitan liability for racial segregation in order to justify a metropolitan order to integrate.

The sole basis for a finding of metropolitan segregation in any of the Seventh Circuit's opinions is found in *Clark* v. *Universal Builders*, 501 F. 2d 324 (7th Cir. 1974). There the court issued a dictum which it has used repeatedly in its housing segregation decisions—particularly in the *Gautreaux* metropolitan remedy decision and in the *Arlington Heights* decision. The court said:

> "Nor do we think it beyond the strictures of judicial notice to observe there exists in Chicago *and its environs* a high degree of racial residential segregation."
>
> 501 F. 2d at 334, 335 (emphasis added)

This single sentence has become the sole empirical basis for ordering metropolitan relief in *Gautreaux* and for finding an affirmative duty to accept low income housing in *Arlington Heights*.

Given the flimsy empirical basis for its metropolitan housing integration decisions and the constitutional limitations announced by *Swann* and *Milliken* on judicial relief to remedy constitutional wrongs, it is obvious that the Seventh Circuit has overreached its authority. However, the Seventh Circuit's error presents this Court with a major dilemma. The Seventh Circuit, the *Gautreaux* plaintiffs, HUD, CHA and the experts for the petitioner homeowner's associations all agree that implementation of the Chicago-only plan will accelerate the racial segregation of the city. Fortunately, the answer to this dilemma lies in HUD's statutory responsibility to promote integrated housing. 42 U. S. C. § 1441; *Shannon* v. *HUD*, 436 F. 2d 809 (3rd Cir. 1970).

In its Petition for Certiorari in *Hills* v. *Gautreaux*, HUD has argued that the *Gautreaux* metropolitan order is impeding "progress toward the goal of integrated housing" and has a "chilling effect" on new housing programs.[25] Yet never once has HUD set forth any statement of how it will promote integrated housing patterns in Chicago. It would be a tragedy if this Court allowed HUD to hide its failure to meet its affirmative statutory duty to *integrate* behind the Seventh Circuit's constitutional overreaching in *Gautreaux*. *Milliken* should not be an escape-hatch for HUD to stand idly by, wringing its hands, as Chicago becomes a totally segregated community. HUD should be required to develop a comprehensive plan for integrating the Chicago metropolitan area. In developing this plan, HUD should be required to solicit and analyze all relevant socioeconomic and racial data.

Without such relief, the plaintiffs in *Gautreaux* and the Seventh Circuit can relish the Pyrrhic victory of momentary desegregation followed by lockstep resegregation. Petitioners here, who desire to remain in stable residential communities in Chicago, will become even more cynical about the ability of government to accommodate their legitimate interests in a pluralistic society.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 1976.

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25. HUD's petition in 74-1047, p. 9.

APPENDIX.

UNITED STATES CODE, TITLE 42.

§ 1441. Congressional Declaration of National Housing Policy.

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution toward an economy of maximum employment, production, and purchasing power. The policy to be followed in attaining the national housing objective established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate

community development and redevelopment, and to provide adequate housing for urban and rural non-farm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own needs and demonstrate that these needs are not being met through reliance solely upon private enterprise, and without such aid; and (5) governmental assistance for decent, safe, and sanitary farm dwellings and related facilities shall be extended where the farm owner demonstrates that he lacks sufficient resources to provide such housing on his own account and is unable to secure necessary credit for such housing from other sources on terms and conditions which he could reasonably be expected to fulfill. The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist (1) the production of housing of sound standards of design, construction, livability, and size for adequate family life; (2) the reduction of the costs of housing without sacrifice of such sound standards; (3) the use of new designs, materials, techniques, and methods in residential construction, the use of standardized dimensions and methods of assembly of home-building materials and equipment, and the increase of efficiency in residential construction and maintenance; (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities; and (5) the stabilization of the housing industry at a high annual volume of residential construction.

UNITED STATES CODE, TITLE 42.

§ 3608. Administration—Authority and Responsibility.

(a) The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

Delegation of Authority; Appointment of Hearing Examiners; Location of Conciliation Meetings; Administrative Review.

(b) The Secretary may delegate any of his functions, duties, and power to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this subchapter. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department of Housing and Urban Development in compliance with sections 3105, 3344, 5362, and 7521 of Title 5. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

Cooperation of Secretary and Executive Departments and Agencies in Administration of Housing and Urban Development Programs and Activities to Further Fair Housing Purposes.

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

Functions of Secretary.

(d) The Secretary of Housing and Urban Development shall—

(1) make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States;

(2) publish and disseminate reports, recommendations, and information derived from such studies;

(3) cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices;

(4) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices; and

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

UNITED STATES CODE, TITLE 42.

§ 4331. Congressional Declaration of National Environmental Policy.

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy

of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

UNITED STATES CODE, TITLE 42.

§ 4332. Cooperation of Agencies; Reports; Availability of Information; Recommendations; International and National Coordination of Efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

UNITED STATES DISTRICT COURT,
N. D. Illinois, E. D.
Nov. 21, 1973.

NUCLEUS OF CHICAGO HOMEOWNERS ASSOCIATION, et al.,
Plaintiffs,

vs.

JAMES T. LYNN, Secretary of the United States Department of Housing and Urban Development, et al.,
Defendants.

No. 72 C 1197.

* * * * *

MEMORANDUM OF DECISION.

JULIUS J. HOFFMAN, *Senior District Judge.*

This suit arises out of court ordered construction of federally financed housing in Chicago.[1] The plaintiffs are a coalition of local community organizations and individuals within the city of Chicago which have incorporated into the Nucleus of Chicago Homeowners Association. The defendants are the Department of Housing and Urban Development, its Secretary, the Chicago Housing Authority, its Commissioners and Executive Director. The plaintiffs assert that the defendants, by failing to file an environmental impact statement in connection with possible environmental effects of the proposed housing projects, have violated the National Environmental Policy Act of 1969, Title 42, United States Code, Section 4332. The plaintiffs maintain that the proposed construction of public housing will significantly affect the environment, and consequently, the defendants are required to file an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act. The defendants contend that the construction of the housing will not significantly affect the environment.

1. See *Gautreaux* v. *Chicago Housing Authority,* 304 F. Supp. 736 (N. D. Ill. 1969) and *Gautreaux* v. *Romney,* 448 F. 2d 731 (7th Cir. 1971). In accordance with the court orders, the Chicago Housing Authority submitted development programs which were to be funded by the Department of Housing and Urban Development.

The question to be decided by this court is whether the proposed building of the housing units would significantly affect the environment so as to require the defendants to file an environmental impact statement under the provisions of the National Environmental Policy Act.

The factual issues concern the social characteristics of the tenants of public housing as compared with the social characteristics of the plaintiffs, and the alleged adverse impact of those characteristics upon the environment. The plaintiffs assert that the social characteristics of the prospective tenants of the housing units will have an adverse impact on the quality of the environment and seek to enjoin the acquisition of housing sites pending the filing of an environmental impact statement. In support of this position, the plaintiffs allege that they are members of the "middle cl[illegible] and/or working class" which emphasizes obedience and respect for lawful authority, has a much lower propensity toward criminal behavior and acts of physical violence, and possesses a high regard for the physical and aesthetic improvement of real and personal property. The plaintiffs further allege that, as a "statistical whole," tenants of public housing possess a higher propensity toward criminal behavior and acts of physical violence, a disregard for the physical and aesthetic maintenance of real and personal property, and a lower commitment to hard work. Therefore, so the plaintiffs insist, the construction of public housing will increase the hazards of criminal acts, physical violence, and aesthetic and economic decline in the immediate vicinity of the sites. The plaintiffs maintain that these factors will have a direct adverse impact upon the physical safety of the plaintiffs residing in close proximity to the sites, together with a direct adverse impact upon the aesthetic and economic quality of their lives.

Cases construing the National Environmental Policy Act, with respect to the requirement of an impact statement, have concerned the environmental impact of a project by its very nature; for example, the building of a highway necessarily results in destruction of natural resources, increased auto emissions, and noise. There is no case involving the impact of a certain class of persons and of their social characteristics upon the environment. This is a case of first impression on that question.

Before a federal agency may take action on a proposal "significantly affecting the quality of the human environment," it must prepare a statement outlining the "environmental impact of the proposed action." Title 42, United States Code, Section 4332(2)(C). Pursuant to Presidential Executive Order 11514, 35 Fed. Reg. 4247 (1970), the Council on Environmental Quality promulgated guidelines, setting forth circumstances under which the National Environmental Policy Act applies.[2] The guidelines clearly state that the Act applies to projects "supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance." Guidelines, § 5 (a)(ii). The provisions of the National Environmental Policy Act clearly apply to this case, there being federal funding of municipal housing.

The defendants contend that they met their responsibilities under the Act by issuing a "negative impact statement" declaring that the proposed housing would not significantly affect the environment and therefore did not file a detailed environmental impact statement. The decision of the defendants having been made in good faith, their judgment will not be disturbed absent a clear showing that an impact statement was required by the facts. See Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 146 U. S. App. D. C. 33, 449 F. 2d 1109, 1115 (1971).

2. Council on Environmental Quality, "Statements on Proposed Federal Actions Affecting the Environment, Guidelines," 36 Fed. Reg. 7724 (1971).

At the outset, it must be noted that although human beings may be polluters (i.e., may create pollution), they are not themselves pollution (i.e., constitute pollution). Environmental impact in the meaning of the Act cannot be reasonably construed to include a class of persons per se. The provisions of the Act concern actions which harm or affect the environment. Therefore, the social and economic characteristics of the potential occupants of public housing as such are not decisive in determining whether an impact statement is required under the Act. The relevant consideration is whether acts or actions resulting from the social and economic characteristics will affect the environment.

The evidence presented by the plaintiffs in support of the position that actions of the tenants of public housing would significantly affect the environment was substantially expert testimony by two social scientists. Their expert opinions were based on data extracted from census reports and statistics on existing public housing tenants. The experts testified that tenants of public housing included a high proportion of unemployment, a high proportion of welfare recipients, and a high proportion of "multi-problem" families. The expert testimony asserted that such tenants are likely to engage in anti-social acts of personal violence and property destruction. The expert testimony further asserted that the plaintiffs have a lesser potential for anti-social conduct than the tenants of public housing. The plaintiffs' case rests primarily upon this expert testimony on the probable behavior of tenants of public housing as contrasted with the probable behavior of the plaintiffs.

The defendants opposed the plaintiffs' expert witnesses with experts of their own selection. The defendants' witnesses contend that the decision that the proposed housing would not have a significant impact on the environment, by its nature or by the actions of its prospective tenants, was not arbitrary, capricious, or unreasonable.

Prognosticating human behavior and analyzing its consequences on the environment is an especially difficult, if not impossible, task. See *Cross* v. *Harris,* 135 U. S. App. D. C. 259, 418 F. 2d 1095, 1107 (1969). Sociology, a discipline attempting such prediction, has not yet attained the stage of an exact science. By its very nature, it relies upon general conclusions drawn from average propositions based on sample data. The different expert conclusions that may be drawn from the same data is evident not only in the evidence before this court, but in the literature of the social sciences. As such, these conclusions are not very persuasive in a court of law.

Predictions of behavior of prospective tenants, whose identity is not yet known, made by the expert witnesses in this case, and the data upon which these predictions are based, are uncertain and unconvincing. The conclusions of the expert witnesses are difficult, if not impossible, to verify and substantiate. The prospective tenants of public housing are individuals, and their behavior may not be presumed to be identical, or even similar, to other individuals in the same social or economic class. The law regards them as free, legally responsible individuals, not as sociological factors in deterministic formulae. The sociological predictions of prospective tenant behavior made by the plaintiffs' expert witnesses and based on statistical averages are not persuasive. "It is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement." *Hanly* v. *Kleindienst,* 471 F. 2d 823, 833 (2d Cir. 1972).

It is the court's conclusion that the evidence does not support the proposition that prospective tenants of public housing will significantly affect the environment. The evidence does not support the allegation in the complaint of differing socio-economic characteristics of the plaintiffs as contrasted with prospective tenants of public housing. There is no evidence to support the plaintiffs' allegations that prospective tenants of public housing are more likely to engage in anti-social conduct than present community residents. Indeed, there is little, if any, evidence of the social characteristics of the individual plaintiffs, none having testified. Thus the proposed construction of the housing units will not significantly affect the environment and the defendants' action in filing a negative impact statement was not in violation of the National Environmental Policy Act.

Accordingly, this court finds in favor of the defendants and against the plaintiffs. Judgment will be entered on the findings and the case is dismissed on the merits with costs. The foregoing memorandum of decision constitutes the court's findings of fact and conclusions of law.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 74-1206

NUCLEUS OF CHICAGO HOMEOWNERS ASSOCIATION, et al.,
Plaintiffs-Appellants,

vs.

JAMES T. LYNN, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 72-1197-C
JULIUS J. HOFFMAN, *Judge.*

Argued October 21, 1974—Decided October 6, 1975.

Before FAIRCHILD, *Chief Judge*, KILKENNY, *Senior Circuit Judge*,* and SPRECHER, *Circuit Judge*.

FAIRCHILD, *Chief Judge*. Plaintiff Nucleus of Chicago Homeowners Association (Nucleus) is an Illinois not-for-profit corporation organized "to prevent the damage to neighborhood communities which will result if low-rent housing for low-income families is placed in working-class and middle-class neighborhoods of Chicago." Along with certain Chicago community organizations and individual citizens residing proximate to proposed low income housing sites, Nucleus filed this lawsuit to enjoin the building of low-income housing units by the Chicago Housing Authority (CHA) with the assistance of the United

* Senior Circuit Judge John F. Kilkenny of the Ninth Circuit is sitting by designation.

States Department of Housing and Urban Development (HUD) on the ground that HUD officials failed to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 *et seq*. After a full trial on the merits, the district court entered judgment for the defendants. We affirm.

I.

This case is yet another episode in the continuing dispute over the location of public housing in the Chicago metropolitan area. The history of this litigation has been recounted elsewhere. See *Chicago Housing Authority* v. *Austin*, 511 F. 2d 82 (7th Cir. 1975) cases cited in note 1. For our purposes only a few salient facts need be noted. As the responsible federal agency, HUD administers the use of federal funds to construct low rent housing. See The Low-Rent Housing Act, 42 U.S.C. § 1401 *et seq*. The CHA is responsible for the construction of low-income housing in the City of Chicago. In order for CHA to receive federal funds, HUD must approve the site selection and construction of low-income housing. In 1969, CHA's site-selection and tenant assignment policies were found to be racially discriminatory. *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907 (N. D. Ill. 1969). To remedy this discrimination and desegregate the Chicago public housing market, CHA was ordered to construct the next 700 units of public housing at scattered sites in predominantly white neighborhoods composed of less than 15% low-income families. 304 F. Supp. 736 (N. D. Ill. 1969). This judgment order was later amended to require the construction of 1500 units of low-income scattered-site housing. 342 F. Supp. 827 (N. D. Ill. 1972). As an initial step to comply with this decree, HUD and CHA have instituted an 84-unit scattered-site housing project.[1] At argument, we were informed that 63 units are presently under construction.

1. The project was originally designated ILL. 2-85 and calls for the construction of housing at 15 different sites with no more than 8 units to be constructed at any one site.

In 1972 plaintiffs filed this suit seeking to enjoin the construction of this public-housing on the ground that HUD officials failed to file an environmental impact statement pursuant to 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332, assessing the impact of siting low-income public housing in middle and working-class neighborhoods. Plaintiffs alleged that low-income housing tenants as a group when compared to the social class represented by the individual plaintiffs possess "a higher propensity toward criminal behavior and acts of physical violence," "a disregard for physical and aesthetic maintenance of real and personal property," and "a lower commitment to hard work." Plaintiffs, in contrast, are alleged to belong to a social class that emphasizes "obedience and respect for lawful authority" and possesses "a much lower propensity for criminal behavior" and "a high regard for the physical and aesthetic improvement of real and personal property." Plaintiffs then charge that the proposed construction of CHA scattered-site housing "will have a direct adverse impact upon the physical safety of those plaintiffs residing in close proximity to the sites, as well as a direct adverse effect upon the aesthetic and economic quality of their lives" so as to "significantly affect the quality of the human environment."

Section 102 of NEPA provides that all "major Federal actions significantly affecting the quality of the human environment" must be accompanied by a detailed statement assessing the environmental impact of the proposed action, 42 U.S.C. § 4332(2)(C).[2] The Council on Environmental Quality

2. The provisions of NEPA section 102 relevant to this litigation are:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(Footnote continued on next page.)

(CEQ), created pursuant to the Act and charged with the responsibility to oversee the implementation of NEPA, promulgated guidelines directing federal agencies to establish their own procedures to identify those actions requiring environmental impact statements. 36 Fed. Reg. 7724. See 40 C.F.R. § 1500.3(a). In 1971 HUD issued draft regulations, which were effective immediately pending final approval, for the systematic environmental evaluation of the department's programs. In accordance with these regulations, HUD, beginning in July 1972, conducted a special environmental clearance for the first 84 sites CHA proposed to comply with the public housing construction ordered in the *Gautreaux* litigation, and in March,

> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible officials on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes; . . . .

1973 the agency issued a negative statement, or Finding of Inapplicability, stating that the project posed no significant environmental impacts. See 38 Fed. Reg. 19186.

At trial plaintiffs challenged the sufficiency of HUD's environmental review. Testimony was introduced on the basis of statistical studies to show that a substantial percentage of CHA tenants are female-headed multi-problem families. Such welfare dependent families as a social group, plaintiffs' experts testified, are acutely in need of employment opportunities and particularly dependent upon public programs providing day care facilities, health care, educational services, and youth and family counseling. If these special needs went unsatisfied, it was predicted that CHA tenants would be likely to cause problems for their neighbors, engaging in acts of violence and property destruction. Arguing that HUD had failed to examine these considerations, plaintiffs concluded that HUD had breached its duty under NEPA to weigh the potential environmental traumas associated with the construction of low-income public housing.

The district court rejected plaintiffs' claim. Doubting the utility of predicting human behavior on the basis of social statistics, the court held that plaintiffs had failed to prove that the social characteristics of the prospective CHA tenants will have a significant impact on the human environment so as to require HUD to prepare an environmental impact statement. This appeal followed.

II.

As an initial matter, we note that the parties agree that HUD's determination that an environmental impact statement need not be filed must stand unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *First National Bank of Chicago* v. *Richardson*, 484 F. 2d 1369, 1381 (7th Cir. 1973). We have recognized that the national environmental policy expressed in NEPA is "as broad as the mind can conceive" and necessarily includes concern for the

quality of urban life. But we have also realized that the environmental problems of the city "are not as readily identifiable as clean air and clean water." *Id.* 484 F. 2d at 1377. Given these uncertainties, the case for relying on an agency's good faith judgment is particularly compelling, and we agree that the arbitrary and capricious standard that ordinarily governs review of administrative matters of this sort is controlling. *Hanly* v. *Kleindienst*, 471 F. 2d 823, 828-30 (2d Cir. 1972), *cert. denied*, 412 U. S. 908. But see *Minnesota Public Interest Research Group* v. *Butz*, 498 F. 2d 1314, 1320 (8th Cir. 1974) (*en banc*).

We dispose first of plaintiffs' contention that HUD violated its duty under NEPA to consider the comprehensive environmental impact of the 1500 unit scattered-site housing program when it confined its environmental analysis to the 84 units the agency has thus far approved. Reliance is placed on HUD and CEQ regulations that charge that proposed actions should be comprehensively evaluated.[3] These regulations, however, plainly vest HUD with discretion to determine the scope of agency

3. The relevant HUD regulation provides:

> (5) *Evaluation of comprehensive activities.* Individual actions that are related either geographically or as logical parts in a composite of contemplated actions may be more appropriately evaluated in a single environmental clearance. For example, several subdivisions may form a large new development. Likewise, a comprehensive project may be composed of, or include, several interrelated activities, e.g., development of a new community or redevelopment of a center city area. In these cases, and where feasible, HUD offices should aggregate individual activities into a larger package and environmental evaluation shall concentrate on the broad and cumulative impacts of the larger activity, as well as the project's specific impact of component activities to the extent known.
>
> The comprehensive environmental evaluation will not satisfy the requirements of this Handbook, however, if it is superficial or limited to generalities. When all significant issues cannot be anticipated or adequately treated in connection with the comprehensive assessment as a whole, environmental clearances of more limited scope will be necessary on subsequent, individual actions in order to fulfill the requirements of this Handbook.

(Footnote continued on next page.)

action to be subjected to NEPA scrutiny. While a given action "may be more appropriately evaluated in a single environmental clearance," HUD is not compelled to aggregate several projects if, in its judgment, evaluation of the aggregate is not feasible.

Indeed, comprehensive evaluation of specific environmental impact is not possible here. CHA had not selected and HUD had not tentatively approved 1500 proposed housing sites at the time the 84 unit environmental clearance was performed. While no doubt there are environmental considerations common to all sites that are best considered in the aggregate, the fact that by design the sites are scattered throughout the neighborhoods of the city counsels for separate consideration of discrete sites. Cf. *Indian Lookout Alliance* v. *Volpe*, 484 F. 2d 11, 18-19 (8th Cir. 1973). Thus, the scattered-site housing here differs decidedly from the construction of a group of buildings in a single location. See, *e.g.*, *Jones* v. *Lynn*, 477 F. 2d 885, 891 (1st Cir. 1973). In the latter case, prudence may well dictate consideration of the proposed construction as a single unit. Suffice it to say, that though we are cognizant of the benefits of comprehensive planning and do not intend to discourage such analysis, we cannot say that HUD has abused its discretion by choosing to evaluate the impact of CHA housing as housing sites are proposed and approved.

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38 Fed. Reg. 19185.

CEQ guidelines charge that

> (a) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. . . . In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. . . . 40 C. F. R. § 1500.6(a).

It has been held that CEQ guidelines are advisory only and do not have the force of law. *Hiram Clarke Civic Club, Inc.* v. *Lynn*, 476 F. 2d 421, 429 (5th Cir. 1973); *Green County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412, 421 (2d Cir. 1972).

Plaintiffs next argue that HUD's decision not to file a full-blown section 103 impact statement was not supported by a record sufficiently developed for judicial review of that decision. NEPA does require that an agency affirmatively develop a reviewable administration record supportive of a decision not to file an impact statement. *First National Bank of Chicago* v. *Richardson, supra*, 484 F. 2d at 1381; *Scherr* v. *Volpe*, 466 F. 2d 1027, 1032 (7th Cir. 1972). But the content and volume of such a record depend upon the particular federal action proposed. A concise statement may be sufficient to support an agency finding of no significant environmental impact if it is grounded on supporting evidence. *Hanly* v. *Mitchell*, 460 F. 2d 640, 646 (2d Cir. 1972), *cert. denied*, 409 U. S. 990.

The gravamen of plaintiffs' complaint is that low-income public housing tenants as a group statistically exhibit a high incidence of violence, law violation, and destruction of property and that HUD failed to consider the adverse impact of these social characteristics on the neighborhoods CHA has chosen for the construction of scattered-site housing. To the extent that this claim can be construed to mean that HUD must consider the fears of the neighbors of prospective public housing tenants, we seriously question whether such an impact is cognizable under NEPA. *First National Bank of Chicago* v. *Richardson, supra*, 484 F. 2d at 1380 n. 13. We agree with the Court of Appeals for the District of Columbia that: "Concerned persons might fashion a claim supported by linguistics and etymology, that there is an impact from people pollution of 'environment,' if the term be stretched to its maximum. We think that type of effect cannot fairly be projected as having been within the contemplation of Congress." *Maryland-National Cap. PK & PL. Com'n* v. *U. S. Postal Serv.*, 487 F. 2d 1029, 1037 (D. C. Cir. 1973).

In any event we need not resolve the question for it is clear that HUD chose to consider the impact of the scattered-site housing on the social fabric of the recipient communities. In

this regard HUD's negative statement relies on several factors to conclude that the project is not likely to produce adverse environmental effects. The low-density design of the housing coupled with the fact that it will be built on vacant lots in compliance with local zoning requirements suggests, for example, that the increased burden on schools, transportation, fire and other community services will be at the most incremental.[4] Moreover, under the *Gautreaux* decree 50 percent of all dwelling units at a site must be offered first to housing applicants who reside in the surrounding community. Hence, there is little reason to believe the influx of new CHA tenants will drastically alter the character of a neighborhood. Finally, CHA's tenant selection and eviction policies further diminish the possibility that prospective CHA tenants will pose a danger to the health, safety or morals of their neighbors.

Likewise, it is apparent that HUD has considered the project's impact on the physical environment of the target neighborhoods. HUD's negative statement is a 156 page document, consisting of a 9 page narrative and 146 pages of HUD worksheets, comments from the Northeastern Illinois Planning Commission, and various exhibits. The statement considers the problems of solid waste disposal, sewage, air pollution, noise levels, and traffic congestion. Relying on the fact that the proposed housing is essentially "infill" of neighborhoods already built up, the statement concludes that the project will have no significant adverse environmental impact. Thus, in our judgment a satisfactory basis exists for judicial review of the agency's decision.

Plaintiffs, nevertheless, argue that the mere existence of a controversy regarding the impact of scattered-site housing requires preparation of a NEPA § 102 environmental impact statement under HUD and CEQ regulations. But the cited HUD

4. Compliance with local zoning regulations and growth consistent with existing growth patterns strongly suggests that a federal action is not environmentally significant. *Maryland-National Cap. PK & PL. Com'n* v. *U. S. Postal Serv., supra,* 487 F. 2d at 1036-37.

regulations only require that the degree of controversy over the environmental consequences of a project should be considered in determining the appropriate environmental clearance procedures that should be followed. 38 Fed. Reg. 19185. An impact statement is not invariably required. CEQ guidelines state that an impact statement must be prepared when the environmental impact of a project is "likely to be highly controversial." 40 C.F.R. § 1500.6(a). But we are not persuaded that the controversy here is such as to require an impact statement.

Finally, plaintiffs contend that HUD's environmental analysis was inadequate because HUD failed to use a systematic interdisciplinary approach and did not explore alternatives to scattered-site housing as required by sections 102(2)(A) and 102 (2)(D) of NEPA, 42 U. S. C. §§ 4332(2)(A) and (2)(D). These NEPA duties are obligatory whether or not an impact statement is to be filed. *Environmental Defense Fund, Inc.* v. *Corps of Engineers,* 492 F. 2d 1123, 1132 (5th Cir. 1974). With respect to HUD's duty to engage in interdisciplinary analysis, plaintiffs specifically assert that the responsible HUD officials never consulted sociologists or read a CHA sponsored study on social problems in public housing entitled *Human Needs in Public Housing*. NEPA, however, does not require that a specific class of experts be consulted or that an agency consider all documents possibly relevant to a given environmental issue. From the negative statement it is clear that HUD, in good faith, considered the impact of the project on the social environment of the site neighborhoods. And, in view of the fact that CHA was under a court order to construct the housing, we cannot say that HUD breached its rather "opaque" duty to engage in interdisciplinary analysis.

With respect to HUD's failure to consider alternative courses of action, plaintiffs' position is equally unfounded. Plaintiffs complain that HUD did not consider the feasibility of broad-scale metropolitan planning and the provision of comprehensive

social services to alleviate the problems of low-income public housing tenants. But since the scattered-site housing was court ordered, HUD and CHA have no alternative but to construct the housing. The only sense in which alternatives can be considered is in site selection and even here CHA and HUD must operate within the parameters of the *Gautreaux* decree. See *Trinity Episcopal School* v. *Romney*, 44 U. S. L. W. 2087 (2d Cir. July 24, 1975). Yet, a recommendation in HUD's negative statement indicating that two sites should be dropped from the project for noncompliance with HUD's Noise Assessment Guidelines pending further environmental analysis suggests that HUD and CHA are exercising some selectivity in site selection. In the context of this case, NEPA requires no more.

Accordingly, the judgment appealed from is affirmed.

AFFIRMED.

OPINION BY JUDGE FAIRCHILD.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60604.

October 6, 1975

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge.*
HON. JOHN F. KILKENNY, *Senior Circuit Judge*.*
HON. ROBERT A. SRECHER, *Circuit Judge.*

NUCLEUS OF CHICAGO HOMEOWNERS ASSOCIATION, ET AL.,
Plaintiffs-Appellants,

No. 74-1206 *vs.*

JAMES T. LYNN, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 1197.

Julius J. Hoffman.
Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this date.

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* Senior Circuit Judge John F. Kilkenny of the Ninth Circuit is sitting by designation.

THE SOCIAL IMPACT OF SCATTERED SITE PUBLIC HOUSING.

by

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and

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THE SOCIAL IMPACT OF SCATTERED SITE PUBLIC HOUSING.

The proposed plan by the Chicago Housing Authority to construct scattered site public housing in various local communities throughout the city of Chicago is designed to achieve racial integration. The objective of this statement is, first, to review existing sociological research in order to assess the social impact of public housing, including scattered site housing, on the residents of both such housing projects and of the local communities in which they are planned, and second, to indicate the types of studies and social planning required in order to take steps to effectively incorporate the residents of these proposed housing units into their local communities.

To this end, the following points will be covered: (a) conclusions of available research on the social consequences of public housing which highlight the failure of public housing; (b) a review of available research on population movements in metropolitan areas which highlight the persistence of racial discrimination and segregation; (c) an examination of the socioeconomic characteristics of the potential residents of scattered site public housing units and of the residents of the adjoining neighborhoods and local communities; and (d) an indication of the types of studies and social planning required to produce the desired objectives.

(a) *Social consequences of public housing.*

In the United States, the development of public housing since the mid-1930's has not produced the desired goals, in contrast to many locations in Western Europe where it has been much more successful. A variety of research[1] points to specific factors

1. Cf. Nicholas J. Demerath, "St. Louis Public Housing Study," *Journal of Housing*, 8 (October, 1962), 472-78; Kenneth B. Clark, *Dark Ghetto* (New York: Harper & Row, 1965); William Ledbetter, "Public Housing: A Social Experiment Seeks Acceptance," *Law and Contemporary Problems*, 32 (Summer, 1967), 490-527; Edward C. Banfield, *The Unheavenly City* (Boston: Little Brown & Co., 1968);

related to inadequate social planning which help to explain the failure of public housing in the United States. These include excessive reliance on high rise construction, poor utilization of land, inappropriate physical construction, inadequate educational, recreational, health and community services, and remote access to employment opportunities. The result of the policies of public housing authorities has been to create low income and racially segregated enclaves on a massive scale. In part, public housing ghettos are a reflection of public attitudes toward poor people and members of minority groups. As a consequence, the approach to public housing in the United States has served to increase the social and residential segregation of the disadvantaged. This result stands in marked contrast to Council housing in Great Britain, which, because of more careful social planning, has not resulted in such massive segregated human enclaves.

More recent investigations of the failure of public housing, like Rainwater's and Suttles' studies on the social fabric of public housing and low income communities,[2] tend to place important emphasis on problems of organization and management. Ceiling on incomes, the absence of effective mechanisms for tenant involvement, weak relations with external public and private groups, rigidities in both local and federal agencies that administer public housing have all resulted in serious questioning on the American scene of the very idea of conventional public

Leonard Freedman, *Public Housing: The Politics of Poverty* (New York: Holt, Rinehart & Winston, 1969); Alfred Page and Warren Seyfried, *Urban Analysis* (Chicago: Aldine, 1970); *Human Needs in Public Housing*, Clyde E. Murray, Project Director (Chicago: Welfare Council of Metropolitan Chicago, 1970); E. D. Huttman, "The Pathology of Public Housing," *City*, 5 (Fall, 1971), 32-34; Huttman, "Public Housing: The Negative Psychological Effect," Address to the Annual Meeting of the American Orthopsychiatric Association, 1971; Irving Welfeld, "That Housing Problem," *The Public Interest*, No. 27 (Spring, 1972), 78-95.

2. Lee Rainwater, *Behind Ghetto Walls*, 402-424; Gerald D. Suttles, *The Social Order of the Slum* (Chicago: University of Chicago Press, 1968), 121-124.

housing. A variety of new schemes for low income housing have been offered. In St. Louis, it was thought necessary to dynamite one major project. In Chicago, smaller projects were sold to residents, while various schemes of rent supplements are being pursued on an experimental basis. Federal authorities have indicated that, at least for a two year period, no new public housing should be constructed.

(b) *Population movements in metropolitan areas.*

As a form of social planning, the proposal to construct scattered site public housing is designed to produce racial integration in housing. This form of planning is essentially based on the assumption that there will be no more integration among the residents of scattered site public housing, but that scattered site housing will introduce racial integration into all white local communities.

In this connection, the extensive research by sociologists like Duncan and Duncan, Taeuber and others on the ecology of population movements and racial change in urban areas makes a sharp distinction between racial transition in a local community and racial integration.[3] Racial transition refers to the process by which Blacks move in and the community changes from an all-white community to an all-Black community. During the period of transition, the community statistically appears to be integrated, but it is only in transition. A racially integrated community, however, is not defined by numbers, but by the two-way movement of racial populations, either by sale or rental of property. Blacks enter a white community and whites continue to enter the community in some of the residences formerly occupied by other whites.

3. Cf. Otis Dudley Duncan and Beverly Duncan, *The Negro Population of Chicago: A Study of Residential Succession* (Chicago: University of Chicago Press, 1957); Conrad Taeuber and Irene B. Taeuber, *The Changing Population of the United States* (New York: John Wiley, 1958).

Research has also demonstrated that—consistently since 1890—in the city of Chicago and other major metropolitan areas of the North, the bulk of the Black population lives in segregated communities or in local communities of racial transition. The basic factors rest in the dynamics of population growth in a context of profound racial prejudice toward Blacks, reenforced by a system of discrimination in the sale and management of real estate.[4] In Chicago, there are at least two areas in which the criteria of racial integration are generally applicable: the near south side and the near north side. In these communities, special factors have produced racial integration: the presence of stable educational and medical institutions, the middle-class character of the population, and advantages of location and cultural resources. Racial integration in these communities brings with it an important measure of socio-economic cohesion.[5]

Numerous communities in the city of Chicago, when faced with the ecological process of Black population growth and expansion, have sought to maintain a stable integrated community and have failed. Moloch[6] has fully documented the

4. Brian Berry's series of evaluations for the Chicago Department of Housing and Urban Development, funded by the Leadership Council for Metropolitan Open Communities, documents the increasing racial polarity of Chicago housing in the 1960's under conditions of accelerated ghetto expansion. Cf., "Down from the Summit: An Evaluation of the Activities of the Leadership Council for Metropolitan Open Communities in Chicago, July, 1968" (September, 1969); "Bunkers at Bay: The Chasm of Duality in Chicago's Real Estate Markets" (May, 1971); "The Limits to Leadership in Open-Housing: Forces Promoting the Maintenance of Dual Housing Markets in Chicago During 1971" (1972).

5. On statistical grounds, it has been strikingly demonstrated that if each community in the Chicago metropolitan area had the same proportion of lower class Blacks as found in particular integrated communities—e.g., high income areas such as Hyde Park or the near north side—there would, in effect, be no central city low-income and Black ghetto. Such an estimate, however, in no way addresses the complex human and social problems involved in eliminating central city ghettos.

6. Harvey L. Moloch, *Managed Integration: Dilemmas of Doing Good in the City* (Berkeley: University of California Press, 1972).

strenuous efforts of a particular south side community (South Shore) to develop community-based programs in middle-class areas where integration was more likely. Despite such efforts, however, communities on the border of the central Black population have generally undergone racial transition.[7]

On the basis of available research evidence and past experience, therefore, there is no basis for asserting that scattered site housing will produce racial integration in residential areas. The continued expansion of the Black community along historic lines implies that scattered site housing will serve only as a *part* of the process of racial transition; if anything, it will probably accelerate the process. This is especially likely when the bulk of the proposed housing sites exist in working class communities which are least equipped to participate in racial integration.

The sheer issue of population numbers involved impressively demonstrates the limited increase in the number of Blacks who have recently moved into suburban Chicago. At the end of 1972 there were still less than 3,000 families living in integrated suburban communities in the six counties of metropolitan Chicago. Even though between 1960 and 1970 the Black suburban population in Cook County increased by 66.6 per cent, Black residents comprise only 3.8 per cent of the total population in these suburbs. During the same ten-year period, despite a decrease of 5.1 per cent in the total population of the city of Chicago, the Black population in the city increased 35.6 per cent. As a consequence, nearly 33 per cent of the total 1970 population in Chicago was Black.[8] It can be estimated, however, that if only one-half of this growth in the Black community took place in the suburbs, there could be effective racial integration in the city of Chicago.

7. Cf. Brian Berry, "Fear in the Neighborhoods," Report for the Leadership Council of Metropolitan Open Communities, Chicago (Summer, 1973, forthcoming).

8. United States Bureau of the Census, Census of Population: 1960 and 1970, *General Population Characteristics*, Final Report PC (1)—B15, Illinois.

(c) *Socioeconomic characteristics of potential residents of scattered site housing.*

As an effort in social planning, the case for scattered site housing can be argued as a device for increasing the supply of housing for low-income Blacks and for locating Blacks closer to sources of employment. Scattered site housing is assumed to be free of some of the worst and most oppressive features of massive public housing.

However, there is an absence of adequate research on the social impact and consequences of scattered site housing. It is known, of course, that this housing would be administered by the same set of agencies which have created and must confront the already existing problems of massive public housing. Therefore, in assessing the present proposal for scattered site housing, it is essential to identify the socioeconomic characteristics of the potential residents of these units and to compare and contrast them with the residents of the local areas. Such a procedure would supply information and guidelines that should enable social planners to assist the new residents to participate effectively in the life of the local community in which they find themselves. It is assumed that a representative sample of the current residents of the Chicago Housing Authority would reside in proposed scattered site housing; to employ any selective criteria would be very difficult to justify and implement.

Some indication of the magnitude and complexity of implementing the present housing proposal can be inferred from a comparison of income levels, public assistance rates, and family patterns between present CHA residents and the residents of those areas in which the proposed sites are located. The following observations are based on a preliminary study of 26 of the designated census tracts and the 1971 Annual Statistical Report published by the Chicago Housing Authority.[9] The data from these two sources are presented in Table 1.

9. The sample from which the following inferences are drawn comes from the Development Program for Project Illinois 2-85 and 2-86. This document lists 120 proposed CHA housing sites scattered in 23 different community areas and 74 different census tracts throughout the city of Chicago; the 120 sites involve the construction of 741 housing units. It would be both impractical and unnecessary to examine each of these tracts in a preliminary study. Consequently, we decided to document only those census tracts which contain two or more proposed housing sites. Our conclusions, therefore, are based on a sample of 26 census tracts (cf. Table 1). It will be clear from an examination of the attached map of Chicago (cf. Figure 1) that these tracts are widely scattered throughout the city.

An examination of these statistics reveals that the median income for current CHA families and unrelated individuals is, on the average, $6,645.00 less than the median income of families and unrelated individuals who reside in the target areas. Except for the proposed sites in the Near North section of Chicago, the comparative difference in income is remarkably similar in all the other separate areas in which housing sites have been proposed. Thus, for the Southeast census tracts, the average difference is $7,336.00. In the Near North there is still an average difference of $2,483.00, while the average difference in the Far North tracts is $7,746.00 and, in the Northwest, $8,228.00.

A comparison of the number of families and individuals receiving some kind of financial assistance reveals similar imbalances. Exactly 53 per cent of the families now living in CHA housing receive public assistance grants, whereas no tract in the areas sampled in our preliminary study shows more than 1.3 per cent of its residents receiving public assistance. In the proposed sites located in the Southeast, Southwest and Northwest areas of Chicago, less than .1 per cent of the population receive public aid. While the Near North rate of .9 per cent and the Far North rate of .3 per cent indicate that in these two areas more local residents receive public assistance than do those in the other proposed areas, the proportion remains dramatically lower than the rate for CHA residents.

A comparison can also be made of the different family patterns of the two populations. Nearly 71 per cent of the families with children who are living in CHA housing are incomplete

families, that is, only one spouse is present in the household. Although census and CHA statistics are not directly comparable on this point, data is available on the number of families headed by a female who live in the areas scheduled to receive CHA housing. In none of these areas does the average number of families headed by females exceed 20 per cent of the total number of families in the area. Across census tracts, the percentage of families headed by females is as follows: In the Southeast, 9.3 per cent; in the Southwest, 13 per cent; in the Far North, 11.2 per cent; and in the Northwest, 10.7 per cent. Only in the Near North tracts does the proportion of families headed by a female approach 20 per cent. In two specific tracts which we documented, the percentages were 19.2 and 19.7 per cent, respectively.

Thus, as compared to the residents of the areas in which the proposed housing will be built, it is clear that the majority of new residents have been deprived of a stable family life and have insufficient family income. Despite their personal strength and initiative, they demonstrate other social characteristics (ineffective education, high rates of unemployment, a propensity to violent crime, gang delinquency, vandalism, etc.) associated with incomplete low income families.

In effect, the residents of the proposed scattered site housing have suffered prolonged social deprivation which has been reenforced by the social segregation and isolation of public housing. For them both to participate effectively in the life of the communities proposed for scattered site public housing and to be relieved of their imposed disabilities, careful and effective social planning is required. The full weight of sociological research indicates that the influx of residents who have experienced disabilities because of their social position and residential experience must inevitably place additional burdens on the neighborhoods and the communities into which they will be moving. It would be a rejection of the grim facts of contemporary society and the findings of sociological research to deny

that families who are being moved from the massive housing projects into scattered sites have more educational, welfare, medical and social problems than the residents in the communities into which they are being moved. Communities are made up of human beings; common sense alone would lead one to assert that the problems of the communities into which they are moving will increase. Does anyone really believe that movement from one housing site to another solves the underlying human problems?

These residents will not be moving into affluent middle-class suburbs. To the contrary, in the proposed communities the educational, recreational, health and public safety institutions are already strained. The socioeconomic characteristics of the potential residents clearly indicate that compensatory resources are required if these neighborhoods are to maintain their present levels of educational, recreational, health and welfare effectiveness. Research into public housing and into the dynamics of the urban metropolis demonstrates that to be concerned merely with population distribution and redistribution, to focus primarily on physical housing and to neglect the essential requirements of human beings and their families is simply to export old social problems from one area to another, often to compound them.[10]

On a more fundamental level, a neglect of the human needs in public housing misconceives the goal of racial integration which the present proposal is designed to achieve. A fundamental premise of social scientists over the past two decades is that racial segregation as it is typically imposed in the United States leads directly to a multiplicity of negative effects not only for Black America but for the nation at large. But social scientists have not made the error of contending that, because enforced racial segregation has negative effects, *all* racial desegregation will have positive effects. It requires little imagination to think of hostile conditions attending such programs as public housing, school

10. Cf. *Human Needs in Public Housing*, pp. 12-14, 226-229.

desegregation, etc., which would limit the benefits of such programs for both races.

At the heart of the failure of many current efforts at social planning is a persistent misreading of the theory of intergroup contact.[11] The theory argues that the key to breaking the vicious circle of racial prejudice and discrimination is not simple contact between the two hostile groups, but *social contact under particular conditions.* These conditions include equal status, common goals, institutional supports, and a non-competitive atmosphere which is likely to lead to the perception of common interests and common humanity. The essential qualification attached to the "integration policy model"—or the "contact theory" as it is sometimes called—is that the above conditions must be held constant before positive effects can be expected from intergroup contact. To take one example—namely, equal status between the two groups—contact theorists have long maintained that this condition is met by equal dignity and access to resources *within* the contact situation itself.[12] Unless steps are taken to meet this condition—e.g., by lessening the status differences between groups by providing needed compensatory services in the community—it is illusory to expect positive results for integration from a program of scattered site public housing.

A basic weakness, then, in the proposed program is that the integration policy model has been misconceived: it has been assumed that positive results would follow, regardless of whether the crucial prior conditions for optimal contact have been met. Part of this weakness derives from a confusion between the social goals of desegregation and integration. Desegregation is achieved by simply ending segregation and bringing blacks and whites together; desegregation implies nothing about the quality of interracial interaction. Integration, on the contrary, involves the conditions for positive intergroup contact, cross-racial acceptance, and equal dignity and access to resources for both racial groups. Unfortunately, what seems to have been done so far in framing the present proposal appears to rest on a fundamentally erroneous understanding of the integration policy model and a neglect of the important distinction between the social goals and desegregation and integration.

11. For a concise statement of the contact theory and review of some of the supporting evidence, see Gordon Allport, *The Nature of Prejudice* (Cambridge, Mass.: Addison-Wesley, 1954), pp. 250-267.

12. Cf. Thomas F. Pettigrew, *Racially Separate or Together?* (New York: McGraw-Hill, 1971).

(d) *Types of studies and social planning required to implement scattered site housing.*

The proposed construction of scattered site housing designed to increase racial integration in Chicago is clearly an experiment in social planning. It is hardly sufficient to assert that the physical structure of scattered site housing is superior to housing which the public housing agencies have created in the past. In order to prevent further deprivation to these residents and to mitigate the attendant tensions and strains in adjoining neighborhoods and communities, the following types of studies are required.

1. A full inventory of the socio-economic and educational characteristics as well as social welfare, medical and recreational needs of these residents.

2. An inventory of the community resources in the areas of the proposed housing sites. This inventory should include specification of the facilities and personnel of day care centers, public and private schools, community centers, religious institutions, parks and playgrounds, plus medical resources and voluntary associations. The inventory should also include the types of part-time and full-time employment available, especially for the younger generation, and the location of such employment opportunities.

3. An assessment of the adequacy of the personnel resources in these communities and an estimate of additional requirements and proposed plans for dealing with required assistance.

In addition to these particular studies, it would be essential to examine the experiences of the existing scattered site housing in Chicago and elsewhere. In this connection, special reference should be placed on the adequacy of the administrative and organizational procedures of the Chicago Housing Authority for handling scattered site housing. As already mentioned, the failure of the last forty years of public housing in the United States is due, in part, to the fact that the administrative practices of public housing groups have not been adequate or responsive to the needs of the residents. Their performance clearly forces one to question whether the administration of scattered site housing will proceed in the same arbitrary fashion and thereby serve to damage the needs both of the residents and the members of adjoining communities. New forms of administration are needed and are crucially important. Because of the history of public housing authority's failure to respond to the needs of their residents, only after suitable plans have been developed for managing these projects should scattered site housing programs be implemented. Moreover, if effective social planning and the necessary antecedent studies are to succeed, it must be recognized that scattered site housing is not a device for racial integration, but another effort to increase the supply of public housing.

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May 7, 1973.

(Tables omitted.)

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In the Supreme Court of the United States

OCTOBER TERM, 1975

NUCLEUS OF CHICAGO HOMEOWNERS ASSOCIATION, ET AL., PETITIONERS

v.

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
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In the Supreme Court of the United States

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Petitioners contend that the Department of Housing and Urban Development failed to comply with the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 *et seq.*, 42 U.S.C. 4321 *et seq.*, by approving the construction of scattered-site low income housing in Chicago, Illinois, without considering the negative impact of certain "social charac-

teristics" of low income families on middle-class and working-class communities.

This lawsuit is the result of a series of court decisions since 1969 holding that discriminatory housing patterns exist in Chicago and that low income housing at scattered sites in predominantly white neighborhoods is necessary to correct the imbalance.[1] Although 1500 apartments are scheduled as a result of these court orders, only 63 units have thus far been built. These apartments were given a special environmental clearance pursuant to HUD's NEPA regulations (Pet. App. A15).[2] The result of HUD's en-

[1] *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill.); *Gautreaux* v. *Chicago Housing Authority*, 304 F. Supp. 736 (N.D. Ill.); *Gautreaux* v. *Chicago Housing Authority*, 436 F.2d 306 (C.A. 7), certiorari denied, 402 U.S. 922; *Gautreaux* v. *Romney*, 448 F.2d 731 (C.A. 7); *Grautreaux* v. *Chicago Housing Authority*, 342 F. Supp. 827 (N.D. Ill.), affirmed *sub nom. Gautreaux* v. *City of Chicago*, 480 F.2d 210 (C.A. 7); *Gautreaux* v. *Romney*, 332 F. Supp. 366 (N.D. Ill.), reversed, 457 F.2d 124 (C.A. 7); *Gautreaux* v. *Romney*, 363 F. Supp. 690 (N.D. Ill.), reversed, 503 F.2d 930, certiorari granted *sub nom. Hills* v. *Gautreaux*, 421 U.S. 962.

[2] HUD's environmental impact regulations (38 Fed. Reg. 19182 *et seq.*) require that projects containing less than 100 units receive "normal environmental clearance," a procedure whereby the department prepares a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact. 38 Fed. Reg. 19186. If no significant environmental impact is discovered, processing of the application may proceed, with the inclusion of appropriate conditions in the HUD contract or grant to minimize any adverse environmental impact that was found. 38 Fed. Reg. 19186. For projects with more than 100 units or for smaller

vironmental study was the issuance, in March 1973, of a negative impact statement, that is, a determination that a full-scale environmental impact statement was not necessary (Pet. App. A17-A18). The negative impact statement, which covered 156 pages, found no violation of sewer, transportation, noise, architectural or zoning standards as a result of the housing project. Moreover, HUD concluded that the project would not cause any strain on existing neighborhood services and facilities because of its scattered nature and small size (Pet. App. A22).

Petitioners, a group of Chicago community organizations and individuals residing near proposed scattered-site housing developments, brought this action

projects involving significant or potentially significant environmental impact, "special environmental clearance" must be prepared. 38 Fed. Reg. 19186, 19188. This involves a detailed analysis of environmental policies and standards and an in-depth determination of the impact of the project on the environment. Based on this study, a decision is made whether a formal environmental impact statement is necessary. 38 Fed. Reg. 19186-19187.

In both normal and special clearance situations, the regulations require the department to give consideration to existing or potential "environmental controversy." In the case of a "major controversy" over "substantive environmental issues" the department is advised to consider a more comprehensive environmental study than would otherwise be required. 38 Fed. Reg. 19185.

The regulations encourage single environmental clearance where appropriate, *i.e.*, for comprehensive activities that are related geographically or as logical parts in a composite of contemplated actions (*e.g.*, subdivisions of a large development). When all significant issues cannot be anticipated or treated in connection with the comprehensive assessment, however, environmental clearances of more limited scope may be used. 38 Fed. Reg. 19185.

against HUD and the Chicago Housing Association (CHA) to enjoin CHA from acquiring land and HUD from funding or approving acquisition of sites for low-income housing until an adequate environmental impact statement for all 1500 contemplated apartments had been prepared. Petitioners alleged that the suit was intended to "prevent the damage to neighborhood communities which will result if low-rent housing for low-income families is placed in working class and middle-class neighborhoods of Chicago," that low-income families who would reside in the proposed housing "possess certain social class characteristics which will and have been inimical and harmful to the legitimate interests of the [petitioners]," and that the issuance of a comprehensive environmental impact statement was necessary to consider these alleged negative characteristics (such as "a higher propensity toward criminal behavior and acts of physical violence * * *, a disregard for physical and aesthetic maintenance of real and personal property * * *, and a lower commitment to hard work for future-oriented goals") that would "significantly affect the quality of the human environment" (Complaint, pp. 11-12; Pet. App. A9, A16).

After a trial, the district court rejected petitioners' contentions, noting that the phrase "environmental impact" within the meaning of NEPA "cannot be reasonably construed to include a class of persons per se" (Pet. App. A11; 372 F. Supp. 147, 149). The court found that the evidence presented by petitioners' sociologists was "uncertain and unconvincing" (Pet. App. A12), that the prospective

tenants of public housing in Chicago would not significantly affect the environment, and that HUD's action in filing a negative impact statement was not in violation of NEPA (Pet. App. A12-A13).

The court of appeals affirmed (Pet. App. A14-A24; 524 F.2d 225). The Seventh Circuit unanimously concluded that a single study for all 1500 proposed apartments was neither warranted by the facts nor mandated by the applicable regulations, that HUD had adequately investigated the social and physical impact of the housing on the community and had sufficiently considered alternatives in its site selection process, and that the department's determination not to file a full environmental impact statement was not arbitrary or capricious.

1. The court of appeals correctly concluded that HUD acted in compliance with NEPA and with all applicable regulations. Although petitioners contend (Pet. 24) that HUD's decision violated guidelines of the Council on Environmental Quality, especially the requirement that an impact statement be prepared to cover all major actions that are likely to be "highly controversial," 40 C.F.R. 1500.6(a), the court below correctly ruled that a controversy over the social characteristics of low income families is not the type contemplated by NEPA or these guidelines (Pet. App. A21). See *Maryland-National Capital Park and Planning Commission* v. *United States Postal Service*, 487 F.2d 1029, 1037 (C.A. D.C.). In addition, not only do CEQ guidelines not bind the executive branch, see *Hiram Clarke Civic Club, Inc.*

v. *Lynn*, 476 F.2d 421, 424 (C.A. 5), but also the guideline upon which petitioners rely was not promulgated until August 1973, several months after the filing of the negative impact statement in this case.

Moreover, contrary to petitioners' allegations (Pet. 24-25), neither the guidelines of CEQ nor the regulations of HUD mandate a single impact statement covering an entire project, although comprehensive environmental evaluation is encouraged. Consideration must only be given to whether all significant issues can be adequately treated without a comprehensive analysis. 38 Fed. Reg. 19185. As the court of appeals noted (Pet. App. A20), HUD did not abuse its discretion in not issuing a comprehensive impact statement covering all proposed scattered-site housing in Chicago since many of those sites had not even been approved at the time that the original environmental clearance was performed and each site by design was to be in a separate neighborhood.

2. The decision below conflicts with neither *Shannon* v. *United States Department of Housing and Urban Development*, 436 F.2d 809 (C.A. 3), nor *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (C.A. 2). In each of those cases, which did not involve claims under NEPA, the court held that the government was required to consider the racial composition of potential new housing residents in order to prevent an increase in segregation and to promote the statutory goal of integration. Similarly, in *Trinity Episcopal School Corporation* v. *Romney*, 523 F.2d 88

(C.A. 2), the court emphasized that the proposed plan of concentrating all minority residents in one block would substantially impede efforts at integration. Thus, those cases concerned situations in which it appeared that federally-sponsored housing would so concentrate the number of minority residents in one area that the community would only be further segregated in contravention of the statutory mandate. Here, however, it is undisputed that the use of scattered-site housing dispersed throughout the City of Chicago precludes the formation of pocket ghettos and that no housing units have been proposed for areas that already have a significant number of minority residents. Furthermore, the housing in issue here was ordered by the courts for the expressed purpose of achieving racial integration.[3]

3. Petitioners claim (Pet. 25-27) that the court of appeals overstepped its proper role. This lawsuit challenged HUD's determination that its 156-page negative impact statement fulfilled the requirements of NEPA and that a full environmental impact statement covering all of the proposed scattered-site housing projects in Chicago was unnecessary. The Seventh Circuit's conclusion that HUD's negative im-

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[3] Moreover, regardless of whether these are the kinds of considerations that must be taken into account under NEPA, it is clear that in this case HUD did "consider the impact of the scattered-site housing on the social fabric of the recipient communities" (Pet. App. A21), although the department may not have relied on the expert studies that petitioners apparently believe are essential to the resolution of that question.

pact statement was sufficient is fully supported by the record.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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Respondents.

BRIEF OF CHICAGO HOUSING AUTHORITY RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE ISSUE PRESENTED.

Whether certiorari should be granted in a case where the factual predicate for petitioners' legal arguments has been found to be without merit by both courts below.

STATEMENT OF THE CASE.

Plaintiffs[1] instituted the instant action to enjoin the construction of public housing[2] in their communities on the ground that

1. For convenience all parties are referred to as they were in the trial court.

2. CHA submitted development programs which were to be funded by HUD in accordance with court orders in *Gautreaux* v. *Chicago Housing Authority*, 304 F. Supp. 736 (N. D. Ill. 1969) and *Gautreaux* v. *Romney*, 363 F. Supp. 690 (N. D. Ill. 1973).

defendants had failed to file an environmental impact statement as required by Section 102(2)(c) of the National Environmental Protection Act (NEPA), 42, U. S. C. A. § 4332(2)(c). Plaintiffs are 600 plus individuals and 25 or more local community organizations but this is not a class action. (Tr. 2045) The Defendants are the Department of Housing and Urban Development (HUD), its Secretary, the Chicago Housing Authority (CHA), its Commissioners and Executive Director.

The gist of plaintiffs' case is that the adverse social characteristics of the families who will become tenants in scattered-site public housing units will have a negative impact on the quality of life in their neighborhoods. Plaintiffs allege that they are members of the "middle class and/or working class", which social classes, as compared to the kind of families that live in public housing, allegedly:

(a) " . . . emphasize obedience and respect for lawful authority and have a much lower propensity toward criminal behavior and acts of physical violence."

(b) ". . . possess a high regard for the physical and aesthetic improvement of real and personal property." (¶ 13, Cts. I and II)

Plaintiffs then assert that, as a "statistical whole", or on the average, members of CHA tenant families, as "compared to the social class characteristics of the plaintiffs", possess:

(a) ". . . a higher propensity toward criminal behavior and acts of physical violence than do the social classes of the plaintiffs."

(b) ". . . a disregard for the physical and aesthetic maintenance of real and personal property which is in direct contrast to the high level of care with which the plaintiffs' social classes treat their property."

(c) ". . . a lower commitment to hard work for future oriented goals with little or no immediate reward than do the social classes of the plaintiffs." (¶ 20, Cts. I and II)

Plaintiffs then assert that by placing housing populated by the kinds of people which currently reside in CHA housing in plaintiffs' communities there will be an adverse impact upon those communities. (¶ 20, Ct. I, ¶ 23 Ct. II)

To support their position plaintiffs offered testimony by two sociologists. Neither had studied or interviewed the actual plaintiffs in this case to see if plaintiffs were in fact members of the social class in which they claimed membership. Nor did plaintiffs' sociologists interview or study the then current CHA tenants, nor did they interview any CHA personnel who are in daily contact with CHA tenants. The sociologists, relying solely on statistical data referring to average characteristics of groups, opined that plaintiffs possessed the social characteristics they alleged they possessed and also that CHA tenants to be placed in scattered site low income public housing possessed the social characteristics attributed to them by plaintiffs.

No evidence was introduced about *plaintiffs'* mean income, *plaintiffs'* number of incomplete families, or their employment or unemployment or educational level, all of which plaintiffs' sociologists deemed crucial in the evaluation of social class. (Tr. 348, 349, 359, 434, 443) Each of plaintiff's sociologists admitted that he did not know the socio-economic class of the prospective tenants of the proposed scattered site family public housing because, of course, they did not yet exist. (Tr. 1872, 1272, 1317)

It was stipulated that "the *majority* of the residents of the CHA do not engage in acts of physical violence or property damage." (Tr. 1159, emphasis added) Moreover, one sociologist testified that not all poor people suffer from "social disorganization" (Tr. 629), and that "not all socially disorganized families engaged in anti-social conduct." (Tr. 630) In fact, he testified that "some socially disorganized families do possess [middle class] values to some extent." (Tr. 1143) He also testified that poor people who are black—and CHA tenants are 82% black according to Plaintiffs' Ex. 43—demonstrate a special affinity for middle class values when he said that "the overwhelming majority of the black population [in the Chicago

Metropolitan Region] shares those [middle class] values [even] those whose income[s] [are] substantially under $8,000.00" (Tr. 1142)

Since this matter involves a future scattered site program, CHA presented evidence of how it selected tenants for its existing scattered site units and its experience with their operation.

Wendell L. Johnson, Jr., a Housing Manager for CHA, managing a total of 3,586 apartments, testified how CHA selected the tenants for the scattered site low rise public housing units at 1911 North Sedgwick and 420 West North Avenue, the "Lincoln Park scattered sites." (Tr. 2752) He stated that CHA carefully scrutinized its files for evidence of adverse social behavior by members of the applicant families and examined rent payment records. He also testified that CHA tried to place families that had two parents present or at least an older boy who could handle the chores required of tenants in low-rise scattered public housing. (Tr. 2780-81) In addition, all of the homes of applicants in the Lincoln Park sites were visited by CHA Central Rental office staff. (Tr. 2783)

Mr. Johnson stated that since the tenants moved into the Sedgwick and North Avenue sites in 1969 (Tr. 2754) CHA had received only 3 reports of incidents which were all minor and quickly resolved.[3] (Tr. 2808-9, 2811-12)

Harry J. Schneider, Executive Director of CHA, testified that, in the case of selecting tenants from applicants for future

3. One involved the son of one family, not himself an authorized tenant, who reportedly was using some kind of narcotic drug. Johnson promptly reported this to the police, who apprehended the young man; Johnson then warned the tenant that she was responsible for the behavior of visitors and that any future repetition of such behavior would result in termination of the lease. That ended that. The second "incident" involved a dispute between some tenants over washing machines, which was resolved "without animosity". The third involved a dog brought home by one of the sons of the families contrary to CHA regulations. The family was told that unless they got rid of the dog, their lease would be terminated; the dog left.

scattered site public housing the CHA will continue to "be much more selective;" he said that the CHA will "select families that have the ability to properly maintain their premises and to conduct themselves in a manner that would be construed as being good neighbors" (Tr. 2257) and that the CHA would "home visit all applicants prior to any decisions as to whether or not they would be accepted for housing." (Tr. 2258)

CHA attempted to have various CHA management personnel testify as to their experience as to the propensity of CHA residents for personal and property violence. However, plaintiffs successfully objected to these witnesses giving such opinions on the grounds they were not qualified to do so.[4]

Their testimony is part of the record as offers of proof. They testified that the kind of people who reside in CHA have no more or less propensity for physical and property violence than other people in other neighborhoods; and that only 10 to 12 per cent of CHA tenants engage in such activity. (Tr. 2382-83, 2386, 2833, 2838)[5]

It was on the basis of this record that the district court concluded that plaintiffs had failed to prove their case. In its opinion (A. 8)[6] the district court stated plaintiffs had failed to prove that individual prospective tenants behavior will be "identical, or even similar, to other individuals in the same social or economic class." (A. 12)

The district court concluded "that the evidence does not support the proposition that prospective tenants of public housing will significantly affect the environment." (A. 12) The evidence

4. It should be noted, however, that it is these same management people that Petitioners now claim should have been consulted in evaluating the impact of scattered site public housing in the target site areas.

5. Their opinion testimony is contained in the Appendix attached hereto.

6. Reported at 372 F. Supp. 147 (N. D. Ill. 1973). "A" references to the District Court's and Court of Appeals' opinions are to the Appendix of plaintiffs' petition.

did "not support the allegation in the complaint of differing socio-economic characteristics of the plaintiffs as contrasted with prospective tenants of public housing" because there was "no evidence to support plaintiffs' allegations that prospective tenants of public housing are more likely to engage in anti-social conduct than present community residents" nor was there "evidence of the social characteristics of the individual plaintiffs, none having testified." (A. 12-13)

It was on the basis of all of these findings of fact that the district court concluded that the construction of the scattered site public housing units would not significantly affect the environment and that the defendants' actions were not in violation of the National Environmental Protection Act (NEPA). Thus, the court entered the judgment for defendants from which plaintiffs appealed.

The Court of Appeals for the Seventh Circuit entered an opinion on October 6, 1975, affirming the District Court's judgment. (A. 14)[7]

ARGUMENT.

I.

Preface.

Plaintiffs' petition overlooks a crucial matter—that the trier of fact found that they had failed to prove the facts upon which their case rests. The focus of this brief in opposition will be upon that failure of proof.

The primary interest of the Chicago Housing Authority, its Commissioners and Executive Director in defending this unusual action is, and has been, to resist the baseless charges against, as the complaint alleges, "low income families of the kind that reside in housing provided, by the Chicago Housing Authority." (¶¶ 11, 12 Cts. I and II) and against the CHA which plaintiffs charge will select families with adverse social characteristics for scattered site public housing. (¶ 17, Ct. I, ¶ 22, Ct. II)

7. Reported at 524 F. 2d 225 (7th Cir. 1975).

Plaintiffs had to prove three basic facts: (1) their social characteristics, (2) the social characteristics of the type of people who reside in CHA housing, and (3) the negative impact of having CHA residents move into plaintiffs' communities by comparing the disparity of the social characteristics of the two groups. They failed. Therefore there is no factual foundation for their legal arguments.

II.

THE DISTRICT COURT'S FINDINGS OF FACT ARE NEITHER NOW BEFORE THIS COURT NOR ARE THEY CLEARLY ERRONEOUS.

Plaintiffs in their petition argue that the lower courts' findings in regards to HUD's actions under NEPA were clearly erroneous. (Petition pp. 24-27) However, what plaintiffs fail to realize is that the district court's decision was based on its findings that plaintiffs had failed to prove (i) the social characteristics of the plaintiffs; (ii) the social characteristics of the prospective scattered site public housing residents of CHA and (iii) the adverse impact of moving the latter into plaintiffs' neighborhoods. Although both courts below held that plaintiffs failed to prove their factual allegations, it is these same allegations of fact which plaintiffs now assume were proven. By innuendo, throughout their petition, plaintiffs invite this Court to engage in a *de novo* review of the evidence. (Petition pp. 1-27, in particular pp. 22, 25)

Plaintiffs intimate that the district court erred in not giving proper consideration to nor adopting their sociologists' opinions—the primary evidentiary basis of their proof. (Petition p. 19) But plaintiffs forget that:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . ." Rule 52(a), F. R. Civ. P.

In applying the "clearly erroneous" test of Rule 52(a) the court of appeals below was mindful of the fact "that their function is not to decide the issues *de novo*." *Zenith Radio Corp.* v. *Hazeltine Research Inc.*, 395 U. S. 100, 123, 89 S. Ct. 1562, 1576, 23 L. Ed. 129 (1969).

Both plaintiffs' sociologists assumed that the plaintiffs were of the middle or working class. However, neither had made any study of the social characteristics of the plaintiffs. All they did was to choose sample census tracts within which some of the plaintiffs resided. They then extracted from the 1970 Census data as to these particular census tracts to arrive at the social characteristics of the average person in those census tracts. (Tr. 353) They *assumed* that the individual plaintiffs possessed these very same social characteristics. (Tr. 357) No evidence was introduced about the individual plaintiffs' mean income, number of incomplete families, employment or unemployment or educational level from which these or any other experts could base an opinion. Yet, it was evidence of these very factors which plaintiffs' experts deemed crucial in the evaluation of social characteristics. (Tr. 348-9, 359, 434, 443)

As to the potential residents of the low income scattered site housing in the target sites, plaintiffs' experts also made a number of assumptions. First, they testified that based on CHA reports current residents of CHA had lower incomes and more incomplete families than the people in the target site sample tracts. (PX 43) With only these two factors at hand they then assumed that CHA tenants possessed other problems of "multi-problem" families—insufficient education, high unemployment and a propensity for violence. (Tr. 359) It was based upon this data and these assumptions that both sociologists (Tr. 357, 986, 1188, 1412) *further assumed* that the prospective tenants of scattered site public housing would also possess these same social characteristics. Yet, both admitted that they did not know the socio-economic class of these prospective tenants because they did not yet exist. (Tr. 1272, 1317, 1872)

Plaintiffs' sociologists were attempting to forecast the social characteristics and behavior of individuals based on generalization about groups of other people. However, the law knows that predicting the behavior of even one human being is an especially difficult, if not impossible task. *Cross* v. *Harris*, 418 F. 2d 1095, 1107 (D. C. Cir. 1969). Common sense suggests that the trial court was not bound to accept plaintiffs' sociologists assumptions and opinions and so does the law.

> "An expert may give his opinion based on assumptions stated by him. *However, if the assumptions needed to support the opinion are not proved, or at least testified to, and not otherwise taken to be true, the opinion is worthless.* See *International Paper Co.* v. *United States*, 5th Cir., in which we stated: 'Of course, opinion evidence may of itself be substantial enough to take a case to the jury. However, an opinion is no better than the hypothesis or assumption upon which it is based.' 227 F.2d 201, 205 . . ." *United States* v. *Cooper*, 277 F. 2d 857, 860 (5th Cir. 1960). (Emphasis added.)

See also *Rewis* v. *United States*, 503 F. 2d 1202, 1205-1208 (5th Cir. 1974) *reh. denied* 506 F. 2d 1386 (5th Cir. 1975) and *Bohus* v. *Board of Election Commissioners*, 447 F. 2d 821, 824 (7th Cir. 1971).

The obvious healthy skepticism of the trial judge in this case is supported not only by judicial precedent (and, of course, by common sense) but by scholars of sociology and social statistics.[8]

Indeed, one of plaintiffs' sociologists recognized that one may not infer individual behavior from the characteristics of a group.

> "When one makes an attribution of a group, say, for instance, as one would in any of these statistics in this exhibit you handed me on the table [PX 43], and say that, you know, a group is characterized in this way, its fal-

8. See, *e.g.*: Robert S. Lynd "Knowledge For What? The Place of Sociology in American Culture," pp. 39, 41; and John G. Peatman, Introduction to Applied Statistics, pp. 6, 7 Harper & Row, New York, 1963.

licious to infer from a group characteristic to a prediction of individual behavior." (Tr. 1791)

The district court's conclusions are also supported by opinion testimony from CHA management officials[9] (the very people plaintiffs criticize HUD for not consulting, Petition pp. 16-17) that the CHA tenants do not have a greater propensity for physical or personal violence than persons such as plaintiffs claim to be, that, indeed 94 to 95% of CHA tenants do not have antisocial tendencies. And of course, the tenants to be selected for the scattered sites not yet built will be more intensively screened than the usual CHA tenant family. (Tr. 2324, 2386, 2537-2540, 2838, 2840-2842, 2370-2371)

Surely, in light of the foregoing and the record the finding of the district court that plaintiffs failed to prove their case cannot be said to be clearly erroneous.

The reasoned opinions of the two lower courts have rejected each factual and legal contention submitted by petitioners and the factual record demonstrates that the district court was correct in its conclusion that plaintiffs failed to prove their case. Since the lower courts concluded that plaintiffs failed to prove their factual allegations, we respectfully submit that the petition is not well founded and that certiorari should be denied, regardless of the questions of law raised.

9. While this testimony came in as "offers of proof" they are in the record, were clearly admissible, and a successful party in the district court may sustain its judgment on any ground that finds support in the record. *J. E. Riley Inv. Co.* v. *Comr. of Internal Revenue Service,* 311 U. S. 55, 59, 65 S. Ct. 95, 85 L. Ed. 36 (1940); *Parmalee Transportation Co.* v. *Keeshin,* 292 F. 2d 794, 797 (7th Cir. 1961) *cert. denied,* 368 U. S. 944, 82 S. Ct. 376, 7 L. Ed. 2d 340 (1961).

CONCLUSION.

For all of the above reasons the Chicago Housing Authority Respondents pray that this Honorable Court deny the Petition for Certiorari submitted by Petitioners.

Respectfully submitted,

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APPENDIX.

Excerpts of Testimony by Samuel J. Rice:

"Q. Now, Mr. Rice, based upon your education your 21 years with the Chicago Housing Authority that you have described, including your seven years as Chief of Community and Tenant Relations for the Chicago Housing Authority, and your regular examination of CHA annual reports such as are in evidence as Plaintiffs' Exhibits 40, do you have an opinion as to the potential incidence for property violence and personal violence among the kind of family that resides in Chicago Housing Authority projects as compared with the potential incidence of such conduct among all the neighbors that you have had since you moved to Chicago in 1947?" (Tr. 2382-83)

"A. No more, no less." (Tr. 2386)

Excerpts of Testimony by Wendell L. Johnson, Jr.:

"Q. Now, based on your experience managing the Cabrini Green project for these years, do you have an opinion as to the percentage of families residing in that project, members of which have engaged either in physical violence or property damage and vandalism or gang delinquency or a combination of these characteristics?" (Tr. 2833)

"A. 10 to 12 percent." (Tr. 2838)